TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 158

FROZEN FOOD EXPRESS, APPELLANT,

vs.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION

No. 159

INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

FROZEN FOOD EXPRESS, ET AL.

No. 160

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., APPELLANTS,

vs.

FROZEN FOOD EXPRESS, ET AL.

No. 161

AKRON, CANTON AND YOUNGSTOWN RAILROAD COMPANY, ET AL., APPELLANTS,

vs.

FROZEN FOOD EXPRESS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

FILED JUNE 17, 1955

JURISDICTION NOTED OCTOBER 10, 1955

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D.C., Nov. 10, 1955

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[fols. 1-14]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

FROZEN FOOD EXPRESS, Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

AMENDED BILL OF COMPLAINT, IN CIVIL ACTION No. 8285—Filed July 12, 1954

To the Said Honorable Court:

Frozen Food Express, a corporation, complainant, files this its Amended Bill of Complaint against the United States of America and the Interstate Commerce Commission, and says that this action is prosecuted for the following purposes:

(1) To enjoin, annul and set aside that certain Order and Notice of the Interstate Commerce Commission of April 13th, 1951 in Docket No. MC-C-968 "Determination of Exempted Agricultural Commodities", which Order is reported in Volume 52, Interstate Commerce Commission Reports, Motor Carrier Cases, Pages 511 through 566, inclusive, which decision and Order is made a part hereof by reference.

(2) To enjoin the Interstate Commerce Commission from interfering or in any manner interrupting the operations of the complainant transporting agricultural commodities (not including manufactured products thereof) between all points within the forty-eight states and the District of Columbia of the United States of America.

Jurisdiction is envoked under 28 U.S.C.A. 1337, 1398 and 2321, et seq., 5 U.S.C.A. 1009, all as will more fully appear hereinafter.

I

Frozen Food Express is a Texas corporation, duly or- [fol. 15] ganized and qualified to do business in the State

of Texas and with a place of business in Houston, Harris County, Texas in the Southern District of Texas.

The Interstate Commerce Commission is a Federal Administrative agency existing under the laws of the United States and by virtue of the Interstate Commerce Act as amended and has jurisdiction over the regulation of the transportation of property for hire moving via common carrier motor carrier in interstate or foreign commerce over public highways to the extent specified in the Interstate Commerce Act, Parts One and Two (49 U.S.C.A. 5, 301-325).

II

Frozen Food Express is the owner and holder of Certificate of Public Convenience and Necessity No. MC-108207 and issued by the Interstate Commerce Commission under the provisions of the Interstate Commerce Act, Parts One and Two, authorizing the transportation of certain commodities between points and places in the States of Arizona, Arkansas, California, Colorado, Illinois, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, New Mexico, Oklahoma, Tennessee, Texas and Wisconsin. (A copy of the Certificate is attached hereto and identified as Exhibit B and made a part hereof.)

III

Frozen Food Express, in addition to the transportation of commodities as authorized by the Interstate Commerce Commission as a commomn carrier motor carrier, is transporting and has been transporting since the enactment of Part Two of the Interstate Commerce Act, Title 49 Paragraph 303(b)(6) commodities consisting of agricultural commodities (not including manufactured products thereof) between various points in the United States. That on such occasions when the vehicles of complainant are transporting agricultural commodities such motor vehicles are not used in carrying any other property or passengers for compensation. That, under the provisions of said Part Two of the Interstate Commerce Act, Title 49, Paragraph 303(b)(6) U.S.C.A., complainant has a right to transport [fol. 16] agricultural commodities (not including manufactured products thereof) between all points and places for

hire in the 48 states and the District of Columbia without securing any character of certificate or permit from the Interstate Commerce Commission. That included in, but not limited to, such agricultural commodities are slaughtered cattle, fresh meat, meat products, frozen whole eggs, dried egg powder, dried egg yolks, cottage cheese, cream cheese, clean rice, rice bean, rice polish, pasteurized milk, fresh cut up vegetables in cellophane bags and fresh vegetables washed, cleaned and packaged in cellophane bags or boxes, fruits or vegetables, quick frozen, shelled peanuts, peanuts shelled ground, killed and picked poultry (although not drawn), rolled barley, butter, coffee ground or roasted, cotton seed meal or hulls, beans, packaged, dried artificially or packed in small containers for retail trade, fruits and vegetables canned, dried fruits, dried mechanically or artificially, peaches peeled, pitted and placed in cold storage in unsealed containers, strawberries canned in syrup in unsealed containers and placed in cold storage, milk condensed, skimmed, powdered, butter-milk, Vitamin D and pasteurized, feathers, frozen meat, frozen dressed poultry.

Frozen Food Express, as aforesaid, has not sought any authority from the Interstate Commerce Commission to transport such commodities for hire for the reason that such commodities, as well as all agricultural commodities (not including manufactured products thereof), are exempted under the provisions of the Interstate Commerce Act, Part Two (supra).

IV

That notwithstanding the plain and unambiguous language of the Interstate Commerce Act in exempting agricultural commodities (not including manufactured products thereof) the Interstate Commerce Commission has by its Order decided April 13th, 1951 in the "Determination of Exempted Agricultural Commodities", 52 M.C.C. 511-566 narrowed the commodities exempted under Section 303(b)(6) of the Interstate Commerce Act and as a result of such Order of the Interstate Commerce Commission complain-
[fol. 17] ant is deprived of the right granted under such exemption to transport agricultural commodities (not including manufactured products thereof), and that said finding and Order of the Commission in the Determination of

Exempted Agricultural Commodities case is arbitrary, unreasonable, capricious and unjust to complainant and constitutes an abuse of the Interstate Commerce Commission's discretion and transcention of its statutory power and authority and that said finding and Order issued by the Interstate Commerce Commission in the Determination of Exempted Agricultural Commodities case, 52 M.C.C. 511-566 is unlawful and void for the following reasons:

1. The Interstate Commerce Commission has no power and authority to compel complainant to secure any Certificate of Public Convenience and necessity from it when the complainant is transporting agricultural commodities (not including manufactured products thereof) and not using its motor vehicles in such transportation in carrying any other property or passengers for compensation because the Congress of the United States has specifically exempted such commodities from the certificate provisions of the Interstate Commerce Act.

2. The decision and Order in the Determination of Agricultural Commodities case by the Interstate Commerce Commission is in effect an abrogation of the complainant's rights to transport agricultural commodities (not including manufactured products thereof) under the provisions of 303(b)(6).

3. The findings contained in the Order in the Determination of Exempted Agricultural Commodities case (supra) are contrary to the lawful authority of the Interstate Commerce Commission.

4. That such findings and Order in the Determination of Exempted Agricultural Commodities case (supra) constitute an unwarranted and unlawful invasion of the power and authority of the Congress of the United States in that such findings and Order repeal and modify and restrict a law passed by the Congress of the United States and that the Interstate Commerce Commission is without such power [fol. 18] and authority under the Interstate Commerce Act.

V

Notwithstanding the express exemption exempting agricultural commodities (not including manufactured products thereof) from the jurisdiction of the Interstate Commerce

Commission, the Commission is threatening to enjoin complainant's transportation of such exempted agricultural commodities (not including manufactured products thereof) and is threatening to file complaints against complainant and unless this Honorable Court enjoins and restrains the Interstate Commerce Commission from enforcing or recognizing the Determination of Exempted Agricultural Commodities decision and Order that complainant will be deprived of the right granted to it under the laws of the United States, and that complainant should have such relief to which it is entitled in law and in equity.

Wherefore, complainant prays that respondent be cited to appear and answer herein and that upon final hearing herein the Order in the Determination of Exempted Agricultural Commodities (supra) be annulled, enjoined, cancelled and set aside and that the interstate Commerce Commission and the United States of America be permanently enjoined and restrained from enforcing or recognizing said findings and Order and that the respondent be permanently and perpetually enjoined and restrained from interfering with the complainant's transportation of agricultural commodities as authorized under the provisions of Section 303(b)(6) and Part Two of the Interstate Commerce Act and that complainant have all other and further relief, at law or in equity, to which it may be entitled, and for its costs.

Phinney and Hallman, 617 First National Bank Bldg., Dallas, Texas, By (S.) Carl L. Phinney, Attorneys for Frozen Food Express, Complainant.

File Connally, Judge, 7/12/54.

[fol. 19] EXHIBIT "B"

Certificate of Public Convenience and Necessity

No. MC 108207 Sub 1*

Frozen Food Express, A Corporation,

Dallas, Texas

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 18th day of June, A.D. 1952

After due investigation, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

It is ordered, That the said carrier be, and it is hereby, granted this Certificate of Public convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

It Is Further Ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

Irregular Routes:

Frozen foods, and *meats, meat products, and meat byproducts* as defined by the Commission (except canned or packaged meats and canned or packaged meat products, other than canned hams, packaged hams, and packaged bacon), *dairy products* as de-

* This certificate embraces the operations authorized in No. MC 108207 Sub 1, as modified by order dated April 21, 1952.

fined by the Commission, *salad dressing*, *yeast*, and *uncooked bakery goods*.

Between points in Texas, Louisiana, Illinois, Michigan, Oklahoma, Missouri and Arkansas.

Between Memphis, Tenn., on the one hand, and, on the other, points in Texas, Louisiana, Michigan, Oklahoma, Missouri and Arkansas.

Between points in Mississippi, on the one hand, and, on the other, points in Arkansas on U.S. Highway 61, and Little Rock, Ark.

Frozen foods, and *meats, meat products, and meat byproducts* as defined by the Commission (except canned or packaged meats and canned or packaged meat products, other than canned hams, packaged hams, and packaged bacon),

Between points in Mississippi, on the one hand, and, on the other, points in Texas, Louisiana, Illinois, Michigan, Oklahoma, and Arkansas (except points in Arkansas on U.S. Highway 61 and Little Rock, Ark.).

Between Memphis, Tenn., on the one hand, and, on the other, points in Illinois and Mississippi.

Restriction: The service authorized herein is restricted against the following described transportation:

Commodities specified in first paragraph above except frozen foods and fresh meats,

Between New Orleans, La., on the one hand, and, on the other, points in Illinois, points in Arkansas on U.S. Highway 61, Little Rock, Ark., and Memphis, Tenn.

Between Chicago, Ill., on the one hand, and, on the other, points in Arkansas on U.S. Highway 61, and Little Rock, Ark.

Between Memphis, Tenn., on the one hand, and, on the other, points in Arkansas on U.S. Highway 61, and Little Rock, Ark.

[fol. 20] *Commodities* specified in first paragraph above except fresh meats,

Between St. Louis, Mo., on the one hand, and, on the other, New Orleans, La., Memphis, Tenn., Little Rock, Ark., and points in Arkansas on U.S. Highway 61.

Fresh meats,

From Memphis, Tenn., to points in Illinois.

Fresh meats and *frozen meat carcasses,*

Between Dallas and Fort Worth, Tex., on the one hand, and, on the other, points in Texas, Louisiana, Oklahoma, Arkansas, and Mississippi.

Commodities, specified in first paragraph above, except frozen food and carcass meat,

Between points in the Kansas City, Mo.-Kansas City, Kans., Commercial Zone as defined by the Commission, on the one hand, and, on the other, points in Oklahoma, Texas, and the Chicago, Ill., Commercial Zone as defined by the Commission.

Fresh or frozen meats, in packages, boxes, or barrels,

From points in the Kansas City, Mo.-Kansas City, Kans., Commercial Zone as defined by the Commission, to points in Louisiana.

Oleomargarine, butter, shortening, yeast, salad dressing and cheese,

Between points in Texas, on the one hand, and, on the other, points in Oklahoma, and Shreveport, La., Little Rock, Ark., and Memphis, Tenn.

Commodities, specified in first paragraph above, except frozen foods,

From points in the St. Louis, Mo.-East St. Louis, Ill., Commercial Zone as defined by the Commission, to points in the Chicago, Ill., Commercial Zone as defined by the Commission.

Unfrozen fresh poultry,

From Springdale and Benton, Ark., to points in the Chicago, Ill., Commercial Zone as defined by the Commission.

It is Further Ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

And It Is Further Ordered, That this certificate shall supersede the certificate issued in this proceeding on July 28, 1950, which is hereby canceled.

By the Commission, division 5.

W. P. Bartel, Secretary.

(Seal)

[fol. 21]

Certificate of Public Convenience and Necessity

No. MC 108207 Sub 3

Frozen Food Express,

A Corporation,

Dallas, Texas

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 28th day of January, A.D., 1949

After Due Investigation, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding:

It Is Ordered, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Neces-

sity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

It Is Further Ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

Frozen foods, fresh meats, and *fruits and vegetables* in mechanically refrigerated equipment, over irregular routes,

Between points and places in California, on the one hand, and, on the other, points and places in Louisiana and that part of Texas on and east of a line beginning at the Oklahoma-Texas State Line and extending along U.S. Highway 83 to junction U.S. Highway 290, thence along U.S. Highway 290 to Sonora, Tex., thence along U.S. Highway 277 to the United States-Mexico boundary line, traversing New Mexico and Arizona for operating convenience only.

And It Is Further Ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, division 5.

W. P. Bartel, Secretary.

(Seal)

[fol. 22] C-103

Certificate of Public Convenience and Necessity

No. MC 108207 Sub 8

Frozen Food Express,

A Corporation,

Dallas, Texas

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 13th day of January, A.D., 1950

After Due Investigation, it appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

It Is Ordered, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

It Is Further Ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

Irregular Routes:

Condensed milk and cream in vehicles equipped for protection against heat and cold,

From Ladysmith, Wis., to points and places in Texas.

Cheese in vehicles equipped for protection against heat and cold,

From points and places in Wisconsin to points and places in Texas.

From Nashville, Shelbyville, and Carthage, Tenn., to points and places in Oklahoma, Louisiana, and Texas.

From Plymouth, Monroe, Milwaukee, and Green Bay, Wis., to points and places in Oklahoma, Arkansas, Mississippi, and Louisiana.

Frozen foods, in vehicles equipped for protection against heat and cold,

From Memphis, Tenn., to Dallas, Tex., and points and places in Oklahoma.

From Nashville, Tenn., to points and places in Oklahoma.

Frozen eggs, in vehicles equipped for protection against heat and cold,

From Enid, Okla., and Dallas and Houston, Tex., to Nashville, Tenn.

Return with no transportation for compensation except as otherwise authorized.

Authority is granted to traverse Iowa, Illinois, Missouri, and Kansas, for operating convenience only.

And It Is Further Ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, division 5.

W. P. Bartel, Secretary.

(Seal)

[fol. 23] Certificate of Public Convenience and Necessity

No. MC 108207 Sub. 12

Frozen Food Express, a Corporation, Dallas, Texas

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 5th day of December, A. D., 1950

After Due Investigation, It appearing that the above-named carrier has complied with all applicable provisions

of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

It Is Ordered, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

It Is Further Ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

Frozen foods and *fresh meats*, over irregular routes,

Between Memphis, Tenn., and points in Arkansas, Louisiana, and Texas, on the one hand, and, on the other, points in Iowa, Kansas, and Nebraska, traversing Colorado, Illinois, Kentucky, Mississippi, Missouri, and Oklahoma for operating convenience only,

Restriction: The Service authorized herein is restricted to the transportation of frozen foods and fresh carcass meat between points in that part of the Kansas City commercial zone, as defined by the Commission, situated in Kansas, on the one hand, and, on the other, points in Louisiana and in that part of Texas on, east, and south of a line beginning at the Oklahoma-Texas State line and extending over U. S. Highway 281 to San Antonio, Tex., thence west along U. S. Highway 90 to Del Rio, Tex., and thence south over U. S. Highway 277 to the International Boundary line between the United States and Mexico, and further restricted to the transportation of frozen foods (a) from Coffeyville, Topeka, and Wichita, Kan., to points in Texas, and (b) from Topeka and Wichita, Kan., to Memphis, Tenn., and points in Ark.

And it Is Further Ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 24] Certificate of Public Convenience and Necessity

No. MC 108207 Sub. 17

Frozen Food Express, a Corporation, Dallas, Texas

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 28th day of November, A. D. 1952

After Due Investigation, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

It Is Ordered, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

It Is Further Ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

Irregular Routes,

Boneless beef, in brine,

From Laredo, Tex., to points in California, with no transportation for compensation on return except as otherwise authorized.

Uncooked biscuits,

From Los Angeles, Calif., to Shreveport, La., and to points in Texas on and east of a line beginning at the Oklahoma-Texas State line and extending along U. S. Highway 83 through Guthrie, Aspermont, Abilene, and Eden to junction U. S. Highway 290, thence along U. S. Highway 290 to Sonora, Tex., thence along U. S. Highway 277 through Del Rio to the United States-Mexico boundary line, with no transportation for compensation on return except as otherwise authorized.

Dressed poultry,

From Brownwood, Paris, Taylor, Waco, and Yoakum, Tex., to Fontana, Fresno, San Francisco, and Los Angeles, Calif., with no transportation for compensation on return except as otherwise authorized.

And it Is Further Ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, division 5.

George W. Laird, Acting Secretary. (Seal.)

[fol. 25] Certificate of Public Convenience and Necessity

No. MC 108207 Sub. 24

Frozen Food Express, a Corporation, Dallas, Texas

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 21st day of April, A. D. 1954

After Due Investigation, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission

to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

It Is Ordered, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

It Is Further Ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

Irregular Routes:

Meats, meat products, and meat byproducts,

Between points in Jackson County, Kans., on the one hand, and, on the other, points in Louisiana, and those in Texas located on, east and south of a line beginning at the Oklahoma-Texas State line and extending along U. S. Highway 281 to San Antonio, Tex., thence along U. S. Highway 90 to Del Rio, Tex., and thence along U. S. Highway 277 to the boundary of the United States and Mexico.

From Wichita, Kans., to points in Texas, with no transportation for compensation on return except as otherwise authorized.

Meats, meat products, and meat byproducts, except fresh meats,

Between points in Louisiana and Texas, on the one hand, and, on the other, points in Iowa, except Ottumwa, and points in Nebraska and Kansas, except those situated in the Kansas City, Mo.-Kansas City, Kans., Commercial Zone, as defined by the Commission.

And it Is Further Ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure

so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, division 5.

George W. Laird, Secretary. (Seal.)

[fol. 26] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed August 9, 1954

The allegation in the unnumbered first paragraph of both the original and amended complaint, states that the complaint, in both instances, was filed against the United States of America and the Interstate Commerce Commission. It is therefore assumed that said Commission is a party defendant to this action without further intervention as authorized in 28 U. S. C. 2323.

The Interstate Commerce Commission, hereinafter called the Commission, reserving all advantage and benefit of exception to errors of the complaint, for answer thereunto, in so much as deemed material, answers and says:

I

Answering allegations of preliminary paragraphs (1) and (2), and paragraphs I and II of the Amended Complaint, the Commission admits that plaintiff is a Texas corpora- [fol. 27] tion with a place of business in Houston in the Southern District of Texas, and is authorized to operate, in interstate commerce, as a common carrier by motor vehicle within the limits of authority granted by the Commission under certificates of public convenience and necessity issued to it, and that this Court has jurisdiction of the action herein and venue of the parties thereto.

II

The Commission denies the allegations of paragraph III of the amended complaint, that plaintiff has not sought any

authority from the Commission to transport commodities such as therein specified and claimed to be exempt from regulations of motor carriers under Part II of the Interstate Commerce Act, Section 203(b)(6), (49 U. S. C. 303(b)(6)), and it is alleged that plaintiff has applied for, been granted and issued, certificates of such authority, as disclosed in part by the six copies of certificates attached to the amended complaint, which are here admitted to be correct copies thereof. It is further denied that plaintiff is authorized to transport for hire the specific commodities named in said paragraph, between all points and places in the forty-eight States and the District of Columbia, except as authorized by certificates of public convenience and necessity granted and issued by the Commission, or of "agricultural commodities (not including manufactured products thereof)" under 49 U. S. C. 303(b)(6), except as have been determined by the Commission to come within that exemption, as fully set forth in its report of April 13, 1951, Docket No. MC-C-968, *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511.

[fol. 28] Further answering the allegations of said paragraph III, that plaintiff, since enactment of Part II of said Act, has been transporting agricultural commodities (not including manufactured products thereof), under 49 U. S. C. 303(b)(6), beyond the limits of certificates issued to it, or beyond the limits of exemption of such agricultural commodities as interpreted and defined in 52 M. C. C. 511, is neither admitted nor denied because of lack of information and knowledge thereof.

III

The Commission denies the allegations of paragraph IV, 1, 2, 3, and 4 of the complaint as amended.

IV

The Commission denies the allegations of paragraph V of the amended complaint, with the explanation that it has taken no official action which could be construed as a threat to enjoin, or file complaint seeking to enjoin, plaintiff's operations, and the Commission has not been officially advised of any such threats or warnings as may possibly

cidental to the preparation of peanuts for market. In the absence of any objection we allow the incorporation by reference in the title proceeding of the pertinent testimony and exhibits relative to peanuts.[2]

Unless otherwise indicated, those filing exceptions to the examiner's findings will hereinafter be called exceptants, and those filing replies to the exceptions will be called repliants.

[Vol. 103] The Issue in General

Section 203 (b)(6), so far as here material, provides as follows:

> Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or *agricultural commodities (not including manufactured products thereof)*, if such motor vehicles are not used in carrying any other property, or passengers for compensation; * * * [Emphasis supplied]

The primary issue here is the determination of the meaning of the underscored words. The institution of the investigation into and concerning these words stemmed from petitions filed by the Secretary of Agriculture and numerous agricultural interests in the *Harwood* case. In that case, Harwood sought a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle of fruits and vegetables, fresh and frozen, between points in Michigan, Ohio, Indiana, and Illinois, over irregular routes. One of the shippers supporting the application was a dealer in fresh fruits and vegetables and the other was engaged in the preparation of fresh vegetable salads and spinach. The salads consist of cut-up vegetables which have been washed and cleaned and are ready for use when

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[2] The matter incorporated by reference consists of testimony found on pages 110 to 313, inclusive, of the transcript in No. MC-89207 and exhibits 7 to 23, inclusive.

have been made by some of its subordinate officials or agents.

V

The Commission alleges further that it instituted, upon its own motion, the proceeding in *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, because of the widespread confusion as to the meaning of the provision, in Section 203 (b)(6) of the Interstate Commerce Act, exempting from regulations of the Act "Agriculture' 'commodities (not including manufactured products thereof)", [fol. 29] which resulted in many different interpretations by shippers, carriers, and conflicting court decisions on the subject, all of which required the official interpretation of the Commission, the only agency of the Government charged with the responsibility of application and enforcement of the Interstate Commerce Act. Many interests directly or indirectly interested in the subject of interstate transportation, and agriculture as related thereto, participated in that proceeding, and their views and evidence, as offered, were given careful considration by the Commission in making its interpretation of said statute, as is fully set forth in said report of April 13, 1951.

VI

The Commission further alleges that all the parties to said proceedings were given a full and complete hearing; that the findings, conclusions, and interpretations in said report entered April 13, 1951, were and are fully supported and justified by the submissions made in said proceedings as aforesaid, and that in making said report it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to said proceeding by their respective counsel.

The Commission further alleges that said report was not made or entered either arbitrarily or unjustly, or contrary to law; that in making said report the Commission did not exceed the authority conferred upon it by law, and the Commission denies each of and all the allegations to the contrary contained in the amended complaint.

[fol. 30] VII

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the amended complaint, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said amended complaint be dismissed.

Interstate Commerce Commission, by (S.) Allen Crenshaw, Associate General Counsel.

(S.) Edward M. Reidy ——— General Counsel, of [fol. 31] Counsel. Certificate of Service (Omitted in Printing)

[fol. 32] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA TO FROZEN FOOD EXPRESS' AMENDED COMPLAINT—Filed August 16, 1954

Comes now the United States of America, a defendant, and for answer to the amended complaint filed herein admits, denies and avers as follows:

I

Answering the allegations contained in paragraphs I and II the United States admits the same.

II

Answering the first and second sentences of the allegations contained in paragraph III, the United States of America neither admits nor denies the same, since it has no knowledge of such.

Answering the third sentence contained in paragraph III, the United States admits the same.

Answering the fourth sentence of paragraph III, the United States avers that the several named agricultural commodities are either manufactured (non-exempt) or non-manufactured (exempt) as contemplated by Sec. 203(b)(6) of the Interstate Commerce Act (49 U. S. C. § 303(b)(6)), as follows:

(1) Slaughtered cattle and fresh meat are non-manufactured or come under the category of livestock;

(2) Meat products are manufactured;

(3) Frozen whole shelled eggs are manufactured;

(4) Dried egg powder is manufactured;

[fol. 33] (5) Dried egg yolks are manufactured;

(6) Cottage cheese is manufactured;

(7) Cream cheese is manufactured;

(8) Clean rice is manufactured;

(9) Rice beans and polished rice are manufactured;

(10) Pasteurized milk is non-manufactured;

(11) Fresh cut-up vegetables in cellophane bags are a manufactured product;

(12) Fresh vegetables, washed, cleaned and packaged in cellophane bags or boxes are non-manufactured;

(13) Fruits and vegetables (quick frozen) are manufactured;

(14) Shelled peanuts are non-manufactured;

(15) Peanuts shelled ground are manufactured;

(16) Killed and picked poultry (not drawn) are non-manufactured;

(17) Rolled barley is manufactured;

(18) Butter is manufactured;

(19) Coffee ground or roasted is manufactured;

(20) Cottonseed meal is manufactured;

(21) Cottonseed hulls are non-manufactured;

(22) Beans, packaged, dried artificially or packed in small containers for retail trade are non-manufactured;

(23) Fruits and vegetables canned are manufactured;

(24) Dried fruits, dried mechanically or artificially are non-manufactured;

(25) Peaches peeled, pitted and placed in cold storage in unsealed containers are manufactured;

(26) Strawberries canned in syrup in unsealed containers and placed in cold storage are manufactured;

(27) Milk condensed is manufactured;

(28) Skimmed milk is non-manufactured;

(29) Buttermilk is manufactured;

[fol. 34] (30) Vitamin D and pasteurized milk are non-manufactured;

(31) Feathers are non-manufactured;

(32) Frozen meat—is non-manufactured or comes under the category of livestock;

(33) Frozen dressed poultry is non-manufactured;

III

Answering the allegations contained in paragraph IV, the United States avers that the order of the Interstate Commerce Commission decided April 13, 1951 in the "Determinaiton of exempted agricultural commodities," 52 M. C. C.; 511-566, holding the following to be exempt, is based on substantial evidence and valid:

(1) All products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits and nuts);

(2) Trees felled and those trimmed, cut to length, peeled, or split, crude resin, maple syrup, sap, bark, leaves, Christmas trees and greenery, and Spanish moss;

(3) Live poultry and bees;

(4) Commodities produced by ordinary livestock, live poultry and bees (such as milk, wool, eggs, and honey);

(5) Fruits, berries, and vegetables which remain in their natural state (but not frozen or quick frozen) including harvesting, washing, cleaning, sorting, grading, polishing, and the various other described non-manufacturing treatments accorded fresh fruits and vegetables;

(6) Dried fruits, vegetables, dried naturally or artificially;

(7) Whole wheat;

(8) Rye;

(9) Oats;

(10) Forage, loose or baled hay, dehydrated hay, naturally or artificially dried hay;

(11) Raw peanuts unsheleld, and other nuts unshelled;

[fol. 35] (12) Cotton in bales or in the seed, cottonseed, ginned cotton, flax fiber and flax seed;

(13) Tobacco leaf, hops, castor beans;

(14) Seeds;

(15) Live chickens, turkeys, ducks, geese, squab, wool in the form sheared from the sheep;

(16) Eggs in the shell, including oiled eggs;

(17) Milk, cream, skim milk, standardized milk, pasteurized milk, homogenized milk and cream and Vitamin D milk and skim milk.

Further answering the United States alleges that the order of the Interstate Commerce Commission hereinbefore referred to holding that the following are not exempt is based on substantial evidence and valid:

(1) Fruits, berries, and vegetables, viz. placed in hermetically sealed containers; frozen or quick frozen; shelled, sliced, shredded, or chopped up;

(2) Seeds prepared for condiment use;

(3) Dehulled rice and oats, and pearled barley;

(4) Shelled eggs, frozen or dried eggs, frozen or dried egg yolks, and frozen or dried egg albumin;

(5) Trees processed further than those felled, trimmed, cut to length, peeled or split;

(6) Mint oil;

(7) Meat products;

(8) Chocolate milk; milk, cream, or skim milk which has been concentrated, dried, fermented, churned or curdled;

(9) Syrup and sugar.

[fol. 36] And further answering the allegations contained in paragraph IV the United States avers that the findings of the Commission in the aforesaid order, holding that the following commodities are not exempt, are not based on substantial evidence contained in the record, and such findings being arbitrary, unreasonable and unjust are null and void:

(1) Slaughtered meat animals and fresh meats;
(2) Dressed and cut-up poultry, fresh or frozen;
(3) Feathers;
(4) Raw shelled peanuts and raw shelled nuts;
(5) Hay chopped up fine;
(6) Redried tobacco leaf;
(7) Cottonseed hulls and linters;
(8) Frozen cream, frozen skim milk and frozen milk;
(9) Seeds which have been deawned, scarified or inoculated.

IV

Further answering paragraph IV the United States alleges that there is no justiciable issue involving the following commodities enumerated in the plaintiff's complaint, since such commodities have been held to be exempted by the Interstate Commerce Commission:

(1) Fresh vegetables, washed, cleaned and packaged in cellophane bags or boxes;
(2) Beans, packaged, dried artificially or packed in small containers for retail trade;
(3) Dried fruits, dried mechanically or artificially;
(4) Pasteurized milk, skim milk or Vitamin D milk.

With respect to those commodities which the Interstate Commerce Commission in its assailed order found to be [fol. 37] non-exempted, but which defendant alleges are exempted, the Commission's findings should be enjoined and the order set aside.

All other findings contained in the order of the Interstate Commerce Commission which the defendant alleges are lawful should be sustained and the order pertaining to the same should be adjudged lawful and valid.

V

Answering paragraph V the United States avers that the complainant will not be deprived of the right granted to it under the laws of the United States if the Interstate Commerce Commission seeks to have enjoined the complainant's transportation of the commodities that the United States alleges are not exempted under the Interstate Commerce Act.

Wherefore the United States prays that that part of the order of the Interstate Commerce Commission that the defendant alleges to be lawful and valid be so declared by the court and that the portion of the order alleged by the defendant to be arbitrary, unjust and unlawful be enjoined and set aside.

The United States further prays that the court grant such other relief as is proper and equitable.

By the United States of America, (S.) James E. Kilday.

Stanley N. Barnes, Assistant Attorney General.

(S.) Charles S. Sullivan, Jr., Special Assistants to the Attorney General.

Malcolm R. Wilkey, United States Attorney, Southern District of Texas.

[fols. 38-42] Certificate of Service—(omitted in Printing).

[fol. 43] IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

Civil Action No. 8285

FROZEN FOOD EXPRESS, PLAINTIFF, EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, INTERVENING PLAINTIFF,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

COMPLAINT OF INTERVENOR EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE U. S.—filed, Aug. 18, 1954

I

Intervening plaintiff, Ezra Taft Benson, Secretary of Agriculture of the United States (herein referred to as the Secretary), brings this complaint to suspend, enjoin, annul and set aside the order of the Interstate Commerce Commission (herein referred to as the Commission) entered on April 13, 1951, in a proceeding before the Commission entitled "MC-C-968, *Determination of Exempted Agricultural Commodities*", 52 M.C.C. 511, insofar as such order finds and concludes that the following commodities are not embraced by the terms "ordinary livestock" or agricultural commodities" as those terms are used in section 203(b)(6) of the Interstate Commerce Act (49 U.S.C. 1946 ed. 303(b)(6)):

[fol. 44] (1) Slaughtered meat animals and fresh meats;
(2) Dressed and cut-up poultry, fresh or frozen;
(3) Feathers;
(4) Raw shelled peanuts and raw shelled nuts;
(5) Hay chopped up fine;
(6) Cotton linters and cottonseed hulls;
(7) Frozen cream, frozen skim milk, and frozen milk;
(8) Seeds which have been deawned, scarified or inoculated.

II

The jurisdiction of the Court is founded upon section 205 (g) of the Interstate Commerce Act (49 U.S.C. 1946 ed. 305 (g)), section 10 of the Administrative Procedure Act (5 U.S.C. 1946 ed. 1009), sections 1336, 1398, 2284, and 2321 to 2325, inclusive, of the Judicial Code (28 U.S.C. 1946 ed. Supp. IV 1336, 1398, 2284 and 2321-2325), and section 201 of the Agricultural Adjustment Act of 1938 (7 U.S.C. 1946 ed. 1291).

III

The United States of America is named as a statutory defendant pursuant to section 2322 of the Judicial Code (28 U.S.C. 1946 ed. Supp. IV 2322).

IV

The Commission is an administrative tribunal, created by the Act to Regulate Commerce approved February 4, 1887 (24 Stat. 383), with specifically vested powers and duties respecting interstate commerce under the said Act and the acts amendatory thereof and supplemental thereto, hereinafter referred to as the Interstate Commerce Act.

[fol. 45]

V

The administrative proceeding entitled "MC-C-968, *Determination of Exempted Agricultural Commodities*" was instituted by the Commission by its order dated June 21, 1948, a copy of which is attached hereto as Appendix A, and was an investigation into and concerning the meaning of the words "agricultural commodities (not including manufactured products thereof)" as used in section 203 (b)(6) of the Interstate Commerce Act (49 U.S.C. 1946 ed. 303 (b)(6)). Hearings were held before a Hearing Examiner of the Commission in Washington, D. C., in November 1948 and in Atlanta, Georgia, in January 1949. Briefs were filed by various parties. In his recommended report served July 29, 1949, the Hearing Examiner found, *inter alia*, that with the exception of slaughtered meat animals and fresh meats, all of the commodities specified in paragraph I hereof are agricultural commodities within the meaning of section 203 (b)(6) of the Interstate Commerce

Act. The Hearing Examiner made no finding whatsoever in regard to slaughtered meat animals and fresh meats. A copy of the Hearing Examiner's recommended report is attached hereto as Appendix B. Oral argument was heard by the entire Commission. In its report and order dated April 13, 1951, a copy of which is attached hereto as Appendix C, the Commission found and concluded that slaughtered meat animals are not embraced by the term "ordinary livestock" and that the other commodities specified in paragraph I hereof are not "agricultural commodities" within the meaning of section 203 (b)(6) of the Interstate Commerce Act (49 U.S.C. 1946 ed. 303(b)(6)).

VI

The Secretary allges that the aforesaid report and order of the Commission in MC-C-968, *Determination of Exempted Agricultural Commodities*, 52 M.C.C. 511, insofar as it finds and concludes that the commodities specified [fol. 46] in paragraph I hereof are neither ordinary livestock nor agricultural commodities, as aforesaid, is unsupported by adequate findings or substantial evidence, is contrary to the weight of the evidence of record, is based upon errors of law, fails to give effect to the legislative purpose of section 203 (b)(6) of the Interstate Commerce Act, exceeds the statutory authority of the Commission, and is unlawful, arbitrary, capricious and null and void.

Wherefore, the Secretary prays that the Court suspend, enjoin, annul and set aside the report and order of the Commission in MC-C-968, *Determination of Exempted Agricultural Commodities*, 52 M.C.C. 511, dated April 13, 1951, insofar as it finds and concludes that the commodities specified in paragraph I hereof are not embraced by the terms "ordinary livestock" or "agricultural commodities" as used in section 203 (b)(6) of the Interstate Commerce Act (49 U.S.C. ed. 303 (b)(6)), and that the Secretary have such other and further relief in the premises as in equity may appertain and as may be deemed by the Court fit and proper.

Respectfully submitted, by the direction of Ezra Taft Benson, Secretary of Agriculture of the United States. (S.) Charles W. Bucy, Associate Solicitor.

(S.) Walter D. Matson, Harry Ross, Jr., Attorneys, Office of the Solicitor, United States Department of Agriculture, Washington 25, D. C.

[fols. 47-48] Certificate of Service (omitted in printing).

[fols. 49-99] APPENDIX "A" TO COMPLAINT

Corrected Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 21st day of June, A. D. 1948.

No: MC-C968

Determination of Exempted Agricultural Commodities

Petitions filed in No. MC-107669 by the Secretary of Agriculture and Atlantic Commission Co., Inc., and others being under consideration; and good cause appearing therefor;

It is ordered, That an investigation be, and it is hereby, instituted by the Commission, on its own motion, into and, concerning the meaning of the words "agricultural commodities (not including manufactured products thereof)" as used in section 203 (b)(6) of the Interstate Commerce Act.

It is further ordered, That this proceeding be assigned for hearing at a time and place to be fixed later; but that in compliance with the request of the Secretary of Agriculture, the date of the hearing shall be at least 90 days from the date hereof.

And it is further ordered, That notice of this order shall be given to the public by depositing copies hereof in the office of the Secretary of the Commission, Washington, D. C. and by filing with the Division of the Federal Register.

By the Commission, W. P. Bartel, Secretary. (Seal.)

[fol. 100] APPENDIX "C" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. MC-C-968[1]

Determination of Exempted Agricultural Commodities

Submitted December 8, 1949. Decided April 13, 1951

1. In No. MC-C-968, meaning of words "agricultural commodities (not including manufactured products thereof)" as used in section 203(b)(6) of the Interstate Commerce Act, determined and certain commodities falling within such term, specified. Proceeding discontinued.

2. In No. MC-107669, upon further hearing, findings in prior report, 47 M. C. C. 597, reversed. Applicant found to have failed to establish that he is willing and able to perform the service proposed or to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder. Application denied.

A. Appearances as shown in prior report in No. MC-107669 and in addition: *James Julian Weinstein* and *John D. Clark* for interveners.

Appearances in No. MC-C-968[2]: *Charles W. Bucy, James K. Knudson,* and *Henry A. Cockrum* for the Secretary of Agriculture of the United States.

A. A. Carmichael, McDonald Gallion, Haygood Paterson, Walter L. Randolph, Gordon Persons, C. C. (Jack) Owens, Jimmy Hitchcock, George O. Miller, Jr., and J. G. Bruce for the State of Alabama and others.

H. K. Thatcher, Ike Murry, and *G. E. Williams* for the State of Arkansas.

M. W. Wells, Lewis W. Petteway, Ed T. Hammil, and *Gordon Stedman* for the Florida Railroad and Public Utilities Commission and others.

Claude Shaw for the State of Georgia.

Sam H. Flint for the Georgia Public Service Commission.

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[1] This report also embraces No. MC-107669, Norman E. Harwood Contract Carrier Application.

[2] A number of parties who entered appearances in No. MC-C-968 also appeared in No. MC-107669.

W. E. Anderson and *J. J. Arceneaux* for the Louisiana Department of Agriculture and Immigration.

Walter E. Piper for Department of Agriculture of Commonwealth of Massachusetts.

James T. Kendall and *Greek L. Rice* for the State of Mississippi.

Elmer W. Carl for the North Dakota Public Service Commission and others.

J. Roy Jones for the State of South Carolina.

C. E. Logwood for the Public Service Commission of South Carolina.

[fol. 101] *L. M. Walker, Jr.*, for the State of Virginia and others.

H. G. Wagner for the Port of Norfolk (Va.) Authority.

J. L. Manton for Virginia Agricultural Extension Service and others.

William C. Seibert for the State Corporation Commission of Virginia.

W. J. Augello, Ed. P. Byars, Percy T. Brewbaker, Frederick E. Brown, Kathryn P. Casey, Max Chambers, Ralph E. Covey, Harry E. Dixon, C. B. Funderburk, Nunzio Giambalvo, Kelly E. Griffith, Eli Grubic, E. L. Hart, L. James Harmanson, Jr., Delos L. James, J. R. Kettler, Donald Kirkpatrick, Wilber LaRoe, Jr., Karl D. Loos, C. E. McDaniel, Percy H. Russell, Jr., Robert H. Roland, J. T. Schatt, Durwood Seals, William R. Settgas, L. W. Sherwood, Raymond E. Steele, Howard L. Stier, A. C. Thompson, John R. Van Arnum, L. J. Whitbeck, Richard P. White, Edgar L. Williams and *E. M. Yarbrough* for shippers, growers, and others.

Harry E. Boot, Edgar S. Idol, and *Albert B. Rosenbaum* for American Trucking Associations, Inc.

H. Scott Byerly for National Council of Private Motor Truck Owners, Inc.

Joseph H. Blackshear, Reuben G. Crimm, R. W. Cronon, Milton E. Diehl, Charles F. Dodrill, James J. Doherty, A. R. Eldred, Wentworth E. Griffin, Frank B. Hand, Jr., Theodor Herman, Harry McChesney, Jr., David G. Macdonald, F. X. Masterson, James W. Nisbet, John R. Norris, Franklin R. Overmyer, Lee Reeder, Charles P. Reynolds, Maynard F. Robinson, Glenn W. Stephens, Clarence D. Todd, Jr., and

Marie Tissier for various motor carriers, motor carrier associations, and rail carriers.

Report of the Commission on Oral Argument

By the Commission:

Exceptions to the order recommended by the examiner were filed by the rail carriers and Railway Express Agency, Inc., and a number of motor carriers and motor carrier associations, to which the Secretary of Agriculture, the State of Alabama, and numerous agricultural interests and others replied; and the parties were heard in oral argument. Our conclusions differ somewhat from those recommended.

The title proceeding is an investigation instituted on our own motion into and concerning the meaning of the term "agricultural commodities (not including manufactured products thereof)" as used in section 203(b)(6) of the Interstate Commerce Act. Upon consideration of petitions filed by the Secretary of Agriculture, and jointly by the [fol. 102] Atlantic Commission Co., Inc., and others by a concurrent order, we reopened No. MC-107669, *Harwood Contract Carrier Application*, 47 M. C. C. 597, hereinafter called the *Harwood* case, for further hearing on a consolidated record with the investigation proceeding.

Representatives of the United States Department of Agriculture and a large number of States, agricultural marketing associations, farmer organizations, shippers, growers, and other interested parties appeared and submitted evidence. A number of rail and motor carriers also appeared but only one presented any affirmative evidence. Neither the applicant in the *Harwood* case nor anyone in his behalf appeared at the further hearing in that proceeding.

At the oral argument, the rail carriers requested that the record in No. MC-89207, *Monark Egg Corporation Contract Carrier Application*, 52 M. C. C. 576, be incorporated into the investigation proceeding by reference. No objection was made to this request, but a ruling thereon was reserved until a study of that record could be made. The request is based on the fact that there is a more extensive record in that proceeding concerning the practices in the industry in-

the desired salad dressing is added. The spinach is washed, cleaned, and packed ready for cooking. The spinach and salads are packed by the shipper in cellophane bags and boxes. After preparation, and pending shipment, the commodities are placed in coolers at the shipper's plant. In concluding that these commodities do not fall within the partial exemption of section 203 (b)(6), division 5 said:

> [fol. 104] The washing, cleaning, and packaging of fresh vegetables in cellophane bags, or boxes for sale to consumers place such commodities in the ordinary channels of commerce and remove them from the class of unmanufactured agricultural commodities falling within the partial exemption of section 203 (b)(6) * * *. Applicant accordingly requires authority to perform the transportation of such commodities. Since the fresh fruits and vegetables will presumably be transported in the same vehicles with the above nonexempt commodities, authority to perform such transportation is likewise required.

It is this finding which the agricultural interests vigorously assail. They contend that such a restricted interpretation is clearly contrary to the intent of Congress and that the extension of this principle to other commodities would have a devastating effect on farmers and agricultural interests as a whole.

The decision was predicated on the "channel of commerce" principle, which was first announced in *Monark Egg Corp., Contract Carrier Application*, 44 M. C. C. 15 (prior report 26 M. C. C. 615), hereinafter referred to as the second report. In that report, division 5, at pages 18 and 19, said:

> The legislative history indicates that the benefits of the exemption were intended for the farmer by affording relief in the transportation of his products to the point where they first enter the ordinary channels of commerce.

Based on this premise, division 5 concluded that peanuts, after delivery by the farmer to the shelling plant and upon removal of the shell by the latter, had entered the ordinary

channels of commerce and "the operation performed upon it at that point removes it from the class of unmanufactured agricultural commodities which was intended to be designated by the section here under consideration." It also concluded that poultry, which is usually commercially killed and dressed by meat-packing companies or by special poultry packers and subsequently transported under refrigeration, can no longer be considered an unmanufactured agricultural commodity.

[fol. 105] The cited cases and others in which division 5 has had occasion to determine the question of whether or not certain commodities were within the partial exemption in question and the pertinent conclusions reached in each instance are reflected in parts I (a) and II (a) of the appendix hereto. Also, listed in that appendix, under parts I (b), II (b), and III thereof, are commodities which our Bureau of Motor Carriers, in response to inquiries, has held informally [4] to be within or without the partial exemption as the case may be.

Interpretation of the Term "Agricultural Commodities (Not Including Manufactured Products Thereof)"

The term "agricultural commodities (not including manufactured products thereof)" is not defined in the act, nor has this term, as such, been interpreted by the Courts, so far as we can determine. The fundamental rule of statutory construction is first to find and bring into effect the actual meaning and intention of the law-making body and to consider the language used in the statute in its natural and ordinary sense. Where the language is wholly clear and free from ambiguity, it must be applied as it is written. But here the language used is not free from ambiguity, in that it is not definite as to what is meant by "agricultural commodities", or as to what constitutes unmanufactured products thereof. In defining the meaning of the term used in the exemption, resort therefore must be

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[4] These informal opinions are expressed in part in the form of an administrative ruling or in letter memoranda. The substance of such opinions were introduced in evidence in exhibit form by the U. S. Department of Agriculture.

made to the legislative history, and if necessary, to other sources.

Legislative History. As passed by the Senate on April 17, 1935, Senate bill 1629, which was the bill ultimately enacted as the Motor Carrier Act, 1935 (now Part II of the Interstate Commerce Act), contained no provision of the nature of the present section 203(b)(6). The bill as reported to the House of Representatives, however, con- [fol. 106] tained a provision (inserted by the House Committee on Interstate and Foreign Commerce) which exempted from most provisions of the act—

> Motor vehicles used exclusively in carrying livestock or *unprocessed* agricultural products. [Emphasis supplied.]

In response to a question concerning the object of this partial exemption, a committee member replied:[5]

> The object was to help the farmer and keep him out of any regulation whatsoever insofar as handling unprocessed agricultural products or livestock on the farm.

The meaning of the term "unprocessed agricultural products" was the subject of considerable debate on the floor of the House and was explained in part by several members of the House Committee on Interstate and Foreign Commerce. For instance, one committee member stated that the term embraced "anything that has not been canned or manufactured or processed;" and that it would include cream and milk. He further agreed that the term "includes all farm commodities produced upon any farm in the raw state ready for market", and stated that "on the whole, that is the way the Commission will interpret it and undoubtedly, the Courts will give the same interpretation to it".[6]

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[5] Page 12213, Congressional Record, Part II, Vol. 79, 74th Congress, First Session.

[6] Page 12205, Congressional Record, Part II, Vol. 79, 74th Congress, First Session.

In order to meet the views of many members of the House the chairman of the sub-committee in charge of the legislation moved to strike the phrase "unprocessed agricultural products" and in lieu thereof to substitute the words "agricultural commodities (not including manufactured products thereof)". He explained the purpose of the proposed amendment as follows:[7]

> [fol. 107] Mr. Chairman, we have heard a good deal of discussion this afternoon as to what is a processed agricultural product, whether that would include *pasteurized* milk or ginned cotton. It was not the intent of the Committee that it should include those products. Therefore, to meet the views of many Members we thought we would strike out the word "unprocessed" and make it apply only to *manufactured products*. [Emphasis supplied]

The sponsor of this amendment further explained that cotton in bales and cotton seed transported from gins to market or to a public warehouse would come under the partial exemption whereas they might not otherwise come within the exemption "since ginning is sometimes considered as processing."[8] The amendment was thereupon adopted. The bill was further amended in certain other respects not material to the matter immediately under discussion. Upon the return of the bill to the Senate, the Chairman of the Senate Committee on Interstate Commerce explained the House amendments generally as liberalizing the provisions of the measure, and stated that they improved the bill and met with his approval.[9] The House amendments were thereupon concurred in by the Senate.

The history of the legislation is not wholly clear as to the intent of Congress, except that the partial exemption

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[7] Page 12220, Congressional Record, Part II, Vol. 79, 74th Congress, First Session.

[8] Page 12220, Congressional Record, Part II, Vol. 79, 74th Congress, First Session.

[9] Page 12460, Congressional Record, Part II, Vol. 79, 74th Congress, First Session.

was to aid the farmer. That the term includes in addition to the raw farm products, commodities that have been treated or processed to an extent beyond such raw products state, is made plain by the explanation of the chairman of the sub-committee in charge of the legislation that the exemption was intended to cover pasteurized milk and ginned cotton. It is thus apparent that the Congress intended the exemption to extend to commodities produced by the farmer in the natural state and to a limited extent those further treated or processed. In the absence of any declaration by Congress, as to what other commodities were to be embraced within the term, it is necessary to look to other sources.

[fol. 108] There is little doubt but that the Congress intended that the term should be construed in its plain, usual, and commonly accepted sense. The task is not an easy one. Some of the parties urge that it should be construed as a whole, following the "channel of commerce" principle, so that once a commodity has left its original source and has been transported beyond such source, it becomes a manufactured product. Others contend for a more liberal interpretation depending upon their interests in the matter.

To arrive at the true meaning of the term, it is necessary to define separately its two component parts, and then use such definitions in combination to make determinations as to the applicability of the partial exemption. Accordingly, we will determine first the scope of the commodities embraced within "agricultural" commodities, and second, the basis for ascertaining what constitutes manufactured products of agricultural commodities, giving at the same time further consideration to the "channel of commerce" principle.

Agricultural commodities—The word "agriculture" has been variously defined, both by the courts and by the lexicographers. In its limited sense it means tillage or cultivation of the soil and the raising of crops. But in a broader sense, and as commonly understood, it means the science and art of production of plants and animals useful to man, including to a variable extent the preparation of these products for man's use and their disposal by marketing or otherwise.

Funk and Wagnalls New Standard Dictionary defines "agriculture" as follows:

> [fol. 109] The cultivation of the soil for food products or any other useful or valuable growths of the field or garden; tillage; husbandry; also, by extension, farming, including any industry practiced by a cultivator of the soil in connection with such cultivation, as forestry, fruit-raising, breeding and rearing of livestock, dairying, market-gardening, etc.
>
> * * * * *
>
> Farming refers to the cultivation of considerable portions of land and the raising of the courser crops; gardening is the close cultivation of a small area for small fruits, flowers, vegetables, etc., and while it may be done on a farm is yet a distinct industry. Gardening in general, kitchen-gardening, the cultivation of vegetables, etc., for the household, market-gardening, the raising of the same for sale, florticulture, the culture of flowers, and horticulture, the culture of fruits, flowers, or vegetables, are all departments of agriculture but not strictly nor ordinarily of farming.

The definition of "agriculture" in standard law texts are of the same general import. In 3 Corpus Juris Secundum 365-366, it is stated:

> In its more common and appropriate sense, it has been said, the word "agriculture" is used to signify that species of cultivation which is intended to raise grain and other field crops for man and beast; it has been said to signify especially cultivation with the plow and in large areas to raise food for man and beast; in a broader sense, "agriculture" is the science or art of the production of plants and animals useful to man; in its general sense "agriculture" includes gardening or horticulture, fruit growing, and storage and marketing. The word covers all things ordinarily done by the farmer and his servants incidental to carrying on his branch of industry; including, to a variable extent, the preparation of products from these for man's use.

A similar definition is found in 2 American Jurisprudence 395, as follows:

> Agriculture, in the broad and commonly accepted sense, may be defined as the science or art of cultivating the soil and its fruits, especially in large areas or fields, and the rearing, feeding and management of livestock thereon, including every process and step necessary and incident to the completion of products therefrom for consumption or market and the incidental turning of them to account. The term is broader in meaning than "farming"; and while it includes the preparation of soil, the planting of seeds, the raising and harvesting of crops, and all their incidents, it also includes gardening, horticulture, viticulture, dairying, poultry, and bee raising, and more recently "ranching". It refers to the field or farm, with all its wants, [fol. 110] appointments, and products, as horticulture refers to the garden, with its less important, though varied, products.

Funk and Wagnalls New Standard Dictionary defines "horticulture" as follows:

> That department of the science of agriculture which relates to the cultivation of gardens or orchards, including the growing of vegetables, fruits, flowers, and ornamental shrubs and trees.

In this broad use "agriculture" has been held to include farming, horticulture, forestry, and dairying. See *State* v. *Christensen*, 137 Pac. (2d) 512, and cases therein cited, *Walling* v. *Rocklin*, 132 Fed. (2d) 3; *Northern Cedar Co.* v. *French*, 230 Pac. 837; *Melendez* v. *John*, 76 Pac. (2d) 1163; *Forsythe* v. *Village of Cooksville*, 190 N.E. 421; *Sancho* v. *Bowie*, 93 Fed. (2d) 323; and *Stuart* v. *Kleck*, 129 Fed. (2d) 400.

The examiner concluded that the word "agricultural" is ordinarily understood to include farming, horticulture, forestry, dairying, and livestock and poultry raising, and the production and marketing of various products of livestock and poultry; and that a like interpretation is here warranted in respect of that term as used in section 203

(b)(6). Certain of the exceptants contend that the examiner's interpretation of the term is too broad, and is erroneous from the standpoint of statutory construction. They urge that a strict construction is proper since the term in question is embodied in an exemption to legislation which is remedial. They offer no substitute for the interpretation mentioned, although one of them refers, for the purposes of comparison, to the foregoing definition of the word "agriculture" found in 3 Corpus Juris Secundum pages 365-366, which does not refer to forestry or dairying. [fol. 111] In using the words "agricultural commodities", it is apparent that Congress did not have in mind only "that species of cultivation which is intended to raise grain and other field crops for man and beast." This is indicated by the legislative history which leaves no doubt that Congress intended that commodities produced in "farming and dairying" were to be included within its meaning. As the transportation of livestock (later amended to "ordinary livestock") was the subject of a separate exemption, it is apparent that the term "agricultural commodities" was not used in a sense broad enough to include livestock. Giving due consideration to the foregoing, and the frequent references in the history of the exemption to the "farm", "farm commodities", etc., we are impelled to conclude that Congress had in mind generally the commonly understood meaning of the word "farm", so as to embrace the edible products usually grown by the farmer and those commodities generally considered to be the products of "farming" or attached to the farm. Therefore, such commodities as nursery stock, flowers and bulbs are not considered as products of "farming" as that term is generally used. However, for reaso.. hereinafter stated, we think that certain forest products are "agricultural commodities". We conclude that the term "agricultural commodities" as used in section 203 (b)(6) embraces all products raised or produced on farms by tillage and cultivation of the soil, (such as vegetables, fruits and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry and bees (such as milk, wool, eggs and honey).

Manufactured products. Having found the scope of the commodities embraced within "agricultural commodities",

we come next to that portion of the term "(not including manufactured products thereof)". In determining what are or are not manufactured products, we must first ascertain the meaning of the word "manufactured".

[fol. 112] The word "manufacture" has frequently been construed by the courts, but different meanings have been given the word depending upon the rule of construction to be followed—whether liberal or strict—the context in which the word was used, and the intent of Congress. The rule of strict interpretation was applied in *Hartranft* v. *Wiegmann*, 121 U. S. 609. The question there before the Court was whether certain articles were manufactures of shells subject to the payment of duties under Federal tariff laws or unmanufactured shells exempt from duties under another provision of the tariff laws. The shells were imported from abroad and had been subjected to a duty under a tariff imposing a 35 per cent ad valorem tax on manufactures of shells. The outer layer of the shells had been removed by acid and the second layer had been ground off. Mottoes were etched on some of the shells. In either condition they were sold as ornaments or for other purposes. In rendering judgment for the importer the Court said:

> We are of the opinion that the shells in question here were not manufactured, and were not manufactures of shells, within the sense of the statute * * * but were in the free list. They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character, or use from that of a shell. The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a "manufactured article" within the meaning of that term as used in the tariff laws.

The Court, however, referred to the rule applicable in tariff cases that "if the question were one of doubt, the doubt should be resolved in favor of the importer as duties are never imposed on the citizen upon vague or doubtful interpretations."

In *Allen* v. *Smith*, 173 U. S. 389, the Court had before it the question of who was entitled to a bounty given by statute "to the producer of sugar"—the grower of sugar cane or

the manufacturer of sugar. In deciding that the latter was the producer, the Court at pages 399 and 400 said:

> The word "producer" does not differ essentially in its legal aspects from the word "manufacturer", except that it is more commonly used to denote a person who raises agricultural crops and puts them in a condition [fol. 113] for the market. In the case of sugar a process of strict manufacture is also involved in converting the cane into its final product. In a number of cases arising in this court under the revenue laws, it is said that the word "manufacture" is ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. That such product is often the result of several processes, each one of which is a separate and distinct manufacture, and usually receives a separate name; or, as stated in *Tide Water Oil Co.* v. *United States*, 171 U. S. 210, 216: "Raw materials may be and often are subjected to successive processes of manufacture, each one of which is complete in itself, and several of which may be required to make the final product".

In a later case, *Fruit Growers, Inc.*, v. *Brogdex Co.*, 283 U. S. 1, involving the validity of a patented process, the issue before the Court was whether an orange, the rind of which had become impregnated with borax, through immersion in a solution, and thereby rendered resistant to blue mold decay, constituted a "manufacture" or manufactured article, within the meaning of a designated Federal statute. In reversing the Circuit Court of Appeals and holding that it was not a "manufacture", the Court at pages 11 and 12 said:

> "Manufacture", as well defined by the Century Dictionary, is "the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery". Also "anything made for use from raw or prepared materials".
>
> Addition of borax to the rind of natural fruit does not produce from the raw materials an article for use which possess a new or distinctive form, quality, or

property. The added substance only protects the natural article against deterioration by inhibiting development of extraneous spores upon the rind. There is no change in the name, appearance, or general character of the fruit. It remains a fresh orange fit only for the same beneficial uses as theretofore.

At this point; it is appropriate to point out that several of the exceptants in support of their contentions that a number of the items classified by the examiner as unmanufactured agricultural commodities are in fact manufactured products, rely upon cases involving an interpretation of the [fol. 114] term "agricultural labor" or similar terms. With respect to cases of this type, the court in *State* v. *Christensen, supra,* said:

> There seems to be considerable confusion in the decisions concerning the interpretation of the term "agricultural labor", or like terms, as used in the exemption clauses of unemployment compensation, fair labor standards, workmen's compensation and taxation cases. It seems to us that some of the confusion has arisen in attempting to apply certain features found to be the determining factor in some cases as the criteria in other situations, instead of looking more to the main purpose of the operation.

The court went on to point out typical instances of the kind referred to above. No good purpose would be served in discussing cases of this type, as the partial exemption relates to "agricultural commodities (not including manufactured products thereof)"; and is not concerned with occupational classifications.

The definition of the word "manufacture", adopted by the Court in *Fruit Growers, Inc.* v. *Brogdex Co., supra,* in our opinion is appropriate for application here, and we conclude that the portion of the term "(not including manufactured products thereof)" means agricultural commodities in their natural state and those which, as a result of treating or processing, have not acquired new forms, qualities, properties or combinations.

The foregoing definitions of the two portions of the term

follow substantially those promulgated and utilized by the examiner. Their adoption here makes necessary further discussion of the "channel of commerce" principle, which most of the exceptants insist should be followed in determining the applicability of partial exemption.

Channel of Commerce Principle—As indicated, the principal contention of most of the exceptants is that the "channel of commerce" principle should be the controlling factor [fol. 115] in determining whether or not an agricultural commodity is within the partial exemption. The examiner did not apply the principle. Instead, he applied substantially the same definitions of the term as approved above to decide whether a particular commodity was manufactured, or not manufactured, using in his determinations the evidence adduced with respect to the processing of such commodities. He concluded that the place where the commodities were processed (but not manufactured), whether or not on the farm or in a commercial establishment, was not controlling of the classification of the commodity.

Most of the exceptants vigorously contend that the legislative history of the act clearly shows that the purpose of the partial exemption, to the extent here considered, was to aid only the farmer and not commercial establishments; that it should be so construed as to restrict exempt vehicles to operations from the farm to the primary market or the point at which the farmer disposes of his products; and that once the commodities in question have entered the ordinary channels of commerce, the partial exemption should be inapplicable. They urge that division 5 in its second report in the *Monark Egg* Case, properly construed the partial exemption when, at page 18, it said:

> The policy reflected in the exemption here under consideration is in accord with the general policy to favor and promote the interests of agriculture. The problem confronting Congress at the time of the adoption of the exemption was to relieve transportation of the essential products of agriculture from some of the incidents of regulation, and yet preserve the general purpose of the necessary regulation of transportation by motor vehicle. The legislative history indicates that the benefits of the exemption were intended for the farmer by

affording relief in the transportation of his products to the points where they first enter the ordinary channels of commerce.

[fol. 116] Several of the exceptants assert that unless the partial exemption is so construed, they will suffer irreparable damage through the loss to operators of exempt vehicles of traffic which they are authorized to transport and upon which they largely depend.

In connection with the foregoing, the American Trucking Association, Inc., requests that the following rule be adopted:

> Any commodity, taken from the field, or from its original source, and transported beyond the confines of such source, becomes a manufactured product when it receives any treatment or processing after such first transportation.

Repliants do not question the rule of statutory construction that exemptions contained in remedial legislation should be strictly construed, but they urge that exceptants seek unduly to restrict the application of the partial exemption. They contend there is no basis for the argument advanced by most of the exceptants that the partial exemption should cease to attach when an unmanufactured agricultural commodity enters the ordinary channels of commerce. In support of such contention they point out that in the second report in the *Monark Egg Case*, division 5 also found that only fish and shell fish dead or alive, as taken from the water, were within the purview of the term "fish (including shell fish)" as used in section 203 (b) (6); but that following the decision of the court in *Interstate Commerce Commission* v. *Love*, 172 F. 2nd 224, we reopened the *Monark Egg Case* in respect of the last-mentioned finding, and in our report on further consideration [10] therein 49 M. C. C. 693,

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[10] By order entered February 13, 1950, No. MC-89207, Monark Egg Corporation Contract Carrier Application, was reopened for oral argument in respect of the matters considered in our report on further consideration, 49 M. C. C. 693.

reversed the prior decision of the division in that respect and found that the term "fish (including shell fish)" includes frozen, quick frozen, and unfrozen fish in the various [fol. 117] forms in which it is shipped, excluding fish in hermetically sealed containers or fish otherwise treated for preserving. In the circumstances, it is argued that no weight may now be given to the prior restrictive decision of the division in its second report in the *Monark Egg Case*, in resolving the issues in the instant proceedings.

The partial exemption contained in section 203 (b)(6) is directed to the motor vehicles, not to the transportation of "agricultural commodities (not including manufactured products thereof)." There is no limitation as to the points from and to which the motor vehicles may be operated. Although the object of the partial exemption as originally framed was to aid the farmer in marketing his products, the substitution of the present language for the words "unprocessed agricultural products" clearly resulted in a broadening of the exemption. That this is so was made plain by the chairman of the subcommittee sponsoring the amendment when he stated that pasteurized milk and ginned cotton were intended to come within the partial exemption. He also indicated that cottonseed would fall within the exemption. It must be assumed that Congress was familiar with the practices obtaining in the industry incidental to the marketing of these and other agricultural commodities. As hereinafter shown, the uncontradicted evidence in this respect is that the pasteurization, among other processing, and bottling of milk for sale to consumers, is customarily done at dairies in the larger cities throughout the country, and that the bulk of the cotton seed is sold by the farmer to the ginners. In the light of these practices and the clear intent of Congress that pasteurized milk was to be included in the partial exemption, irrespective of the fact that the milk was processed after entering the ordinary channels of [fol. 118] commerce, or that the cotton seed was sold to the ginner, it is difficult to conclude that Congress intended that other agricultural commodities, processed (but not manufactured) or packaged for consumer use, regardless of ownership, should be treated differently. Moreover, to hold that the place at which the commodities are predominantly

processed or packaged is controlling of the applicability of the partial exemption would, in many instances, prevent the movement by exempt vehicle of items processed or packaged by farmers themselves, a result obviously not intended by Congress.

Certain of the exceptants contend that by amending the original phraseology of the partial exemption, Congress intended to broaden the exemption only to the extent of including therein pasteurized milk, ginned cotton, and cottonseed. If such a result had been intended Congress could simply have added the three named commodities after the words "unprocessed agricultural products". We think the commodities mentioned were intended to be illustrative of the types of processing permissible under the partial exemption as now phrased.

It is significant that in other sub-paragraphs of section 203 (b), Congress specifically limited the operations of exempt motor vehicles. For example, section 203 (b) (1) applies to "motor vehicles employed solely in transporting school children and teachers to and from school;" section 203 (b) (3) relates to "motor vehicles owned or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations", section 203 (b) (4a) applies to "motor vehicles controlled and operated by any farmer when used in the transportation of his agricultural [fol. 119] commodities * * *"; and section 203 (b) (5) concerns "motor vehicles controlled and operated by a cooperative association * * *". In light of the foregoing limitations imposed upon the operations of the particular exempt motor vehicles, and the failure of Congress similarly to limit exempt motor vehicles carrying "agricultural commodities (not including manufactured products thereof)", the argument advanced by exceptants that the partial exemption of section 203 (b) (6) applies only to exempt motor vehicles carrying unmanufactured agricultural commodities from the farm to the point where they enter the ordinary channels of commerce is without merit.

Certain of the certificated motor carriers, exceptants herein, transport under appropriate authority such commodities as shelled raw peanuts and dressed poultry, heretofore found by division 5 to be without the partial exemp-

tion. They fear that a reversal of these prior decisions would result in irreparable damage to them through the loss of a considerable portion of their traffic to operators of exempt motor vehicles, and contend that by its failure to amend section 203 (b)(6), at least since the issuance of the second report in the *Monark Egg* case, Congress by implication must be considered to have acquiesced in the interpretation placed thereon by division 5. In the *Love* case, a similar contention made by us in respect of the interpretation by division 5 of the term "fish (including shellfish)" as used in section 203 (b)(6), was rejected by the court. We are here concerned only with the meaning of the words "agricultural commodities (not including manufactured products thereof)" as used in section 203 (b)(6).

Inconvenience or hardships, if any, that result from following a proper interpretation of the statute can be relieved only by Congress. We conclude that the "channel of commerce" principle is not appropriate for use in determining the applicability of the partial exemption.

[fol. 120] General

The foregoing definitions of the component parts of the term in question furnish a basis by which a determination may be made of what commodities, processed or unprocessed, fall within the partial exemption. As pointed out by certain of the agricultural interests, however, any definition of the term would be susceptible to varying interpretations and would be impractical of application for administration or other purposes. They assert that as a result of constructions and interpretations of the term by division 5 and by our Bureau of Motor carriers, and because of confusion which exists in the agricultural and motor carrier industry as to what agricultural commodities come within the purview of the term and as to what type of processing may convert the agricultural commodity to a manufactured product, the Secretary of Agriculture and others, believe that something more than a mere definition of the term is necessary. In order that the growers, processors, packers, carriers, and others might be fully apprised of the commodities which fall within the partial exemption, evidence was pre-

sented pertaining to the various practices and methods employed generally in the agricultural industry in connection with the preparation for market of numerous agricultural commodities. In the circumstances, we shall proceed to consider, as did the examiner, the commodities and groups of commodities to determine whether individual commodities or classes of commodities are agricultural commodities falling within the partial exemption on the basis of the foregoing definitions and of the evidence adduced relating to the various commodities.

It has been suggested that a master list of the numerous agricultural commodities, found to be within the partial exemption, be prepared. Although the listing of such commodities would be desirable, it is not believed feasible here, as evidence was not presented in respect of all agricul- [fol. 121] tural commodities. Our findings herein will include those agricultural commodities which we have determined to be unmanufactured, either by groups, classes, or individually. Such classification, when considered in connection with the various treatments or processes discussed herein, may also serve as a guide for determining whether or not most, if not all, of the commodities not specifically considered herein would or would not fall within the partial exemption.

Evidence of the character described was presented by a number of employees of the United States Department, of Agriculture, hereinafter called the Department, including 11 scientists, by two professors of Ohio State University, by officials or agencies of nine States,[11] by State and regional producers and shippers,[12] by various associations of pro-

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[11] Alabama, Florida, Georgia, Louisiana, Maryland, Mississippi, North Dakota, South Carolina, and Virginia.

[12] Alabama Farm Bureau Federation, Growers and Shippers League of Florida, Winter Garden (Fla.) Citrus Growers Association, American Fruit Growers Association, Georgia Fruit Exchange, Maryland Vegetable Growers Association, State Grange for South Carolina, and several individual growers and companies.

ducers and shippers,[13] and by an unregulated motor carrier. Evidence also was offered by the National Grange and others relative to the history and background of the partial exemption, and a number of resolutions adopted by various organizations, opposing the *Harwood* case principle, were introduced. Each Department scientist presented evidence in respect of a separate phase of agriculture in which, for the most part, he has specialized and engaged in research [fol. 122] work for many years. In each instance an exhibit was received listing all or the more important basic agricultural commodities discussed by the particular witness, the processes or treatments accorded each in preparing the commodity for market, and a list of those commodities or products which each scientist considered to be non-manufactured or manufactured; as the case may be. Each scientist is the author of numerous technical papers and popular writings in his particular field. The evidence offered by these persons presents an overall and, in most instances, a complete picture of the steps taken or treatments accorded the various groups of commodities preparatory to reaching the consumer markets, and will be discussed in some detail. Evidence offered by the growers, shippers, and others, which for the most part is corroborative, will be discussed only to the extent that some new matter is covered. Thus for the first time we have presented to us a portrayal of the various treatments or processes which the many different agricultural commodities customarily undergo in preparing them for market, the marketing practices, and other pertinent phases of the industry.

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[13] Vegetable Growers Association of America, National League of Wholesale Fresh Fruit and Vegetable Distributors, Texas Cottonseed Crushers Association, American Association of Nurserymen, International Apple Association, National Association of Commissioners, Secretaries, and Directors of Agriculture, American Farm Bureau Federation, Florida Fruit and Vegetable Association, Society of American Florists, Cotton Producers Association, Southeastern Peanut Association of Albany, Ga., Cooperative Growers' Association of Burlington County, N.J., and Appalachian Apple Service.

Vegetables and Fruits

We shall discuss first the evidence presented in respect of the vegetable group. Fifty-eight vegetables are embraced in this group. The various over-all treatments considered by the Department scientist to be non-manufacturing are: harvesting, trimming, husking, wiping or brushing, washing (with or without chemicals), drying (not dehydrated), waxing, polishing, sorting, sizing, grading, tying, cutting, curing, wrapping, icing, refrigerating, precooling, ripening, fumigating, packaging, crating or boxing, bagging, peeling, shredding, chopping, and slicing. Not every vegetable listed, however, undergoes all of these treatments. For example, [fol. 123] celery is harvested, dried, fumigated, packages or bagged; and the process "curing" applies only to garlic, onions, sweet potatoes, yams, and winter squash. As the meaning of most of the named treatments or terms are readily understood, the testimony in this respect was limited to an explanation of those terms not commonly understood or as to which some further comment was required. The precooling of vegetables is performed by ice, water, or cold air in order to remove field heat from the commodity. very little washing of crop is done in the field now. Ordinarily washing facilities are installed at some convenient spot not far distant. Sometimes chemicals are added to the water in order to prevent infection of the vegetables; but the chemicals are said not to change the basic character of the washed vegetable. Peeling, shredding, chopping, and slicing are generally factory treatments, and, in the opinion of the scientist, when done as steps in canning, freezing, dehydrating or some other manufacturing process, constitute the items manufactured products.

Fumingation involves the application of a chemical vapor for the control of insects. For example, beans and peas in storage have to be fumigated frequently to control weevils; also certain quarantine laws require fumigation.

Machinery is used in many of the foregoing treatments, even at the harvesting stage. Such machinery is located both on farms and in commercial establishments. With the exception of the sizing of peas and the peeling, shredding, chopping, or slicing of the individual vegetables, when done as a step in canning, quick-freezing, dehydrating or other

such manufacturing processes, the scientist does not consider that any of the steps or treatments enumerated above cause the particular commodity to become a manufactured product. He expressed the opinion, however, that the mix- [fol. 124] ing of chopped-up vegetables, such as those sold under the trade name of Veg-mix, results in a manufactured product.

Other treatments specified, such as salting (brining), crushing, extracting, straining or filtering, blanching (scalding), canning,[14] freezing (quick-freeze process), dehydrating, evaporating, grinding (dry), fermenting, and splitting (peas), in the opinion of this scientist, render the affected items manufactured products. Vegetables which are quick frozen or dehydrated are always previously blanched or scalded (precooked) in order to inactivate the enzymes and thus "kill the plant life." In such instances, he considers the resultant articles to be a manufactured product. He is of the same opinion in respect of instances where ascorbic acid is added to the commodity.

The various fruits as to which another scientist offered evidence, include: oranges, grapefruit, tangerines, lemons, limes, berries,[15] avocados, mangos, dates, currants, persimmons, olives, apples, pears, quinces, peaches, plums, prunes, cherries, grapes, apricots, nectarines, pineapples, melons, and watermelons. Certain tropical or sub-tropical fruits[16] are contained elsewhere in his exhibit, but the treatments accorded them are not shown. The fruits itemized above are treated or processed in substantially the same manner as vegetables with the addition of such treatments (regarded by this scientist as non-manufacturing), [fol. 125] as polishing, adding color, gassing, and heating

[14] When used as an inclusive term to identify the entire "canning" process; the can or container does not, in the witness' opinion, make the commodity manufactures.

[15] Includes strawberries, blackberries, cranberries, gooseberries, loganberries, blueberries, and any kind of wild berries that may be harvested for marketing in commercial channels.

[16] Citron, kumquats, bananas, figs, guavas, loquats, sapodillas, and pomegranates.

(for insect control). As in the case of vegetables, all of the named treatments are not accorded each kind of fruit listed. By way of illustration, all of the fruits are harvested, sorted, sized, graded, and packaged, but only grapes and pineapples are trimmed, only grapefruit are "heated" for insect control, and only lemons are cured. Apples and pears are the fruits commonly washed with chemicals to remove residue from spraying; the other fruit generally are washed only for the purpose of cleaning.

In the opinion of this scientist the mixing of several kinds of sliced or chopped-up fruits and packaging in a cellophane bag—even if identified to the trade as a salad mix—would not be a manufactured product, as the basic nature of the ingredients has not been changed. With the exceptions noted above, he does not regard the application of any of the named treatments as changing the fruit into a manufactured product. Generally speaking, all of the processes or treatments listed as non-manufacturing are performed at the orchards, on the farms, or in the immediate vicinity, perhaps in a centralized packing house. They are done at the point of production prior to delivery for sale to the retailer or ultimate consumer.

The scientist considers a product to be manufactured if it is drastically or markedly changed in composition or quality. In arriving at this conclusion, he also has taken into consideration the historical background "of where and for what the treatment is applied". Treatments considered by him to be such as to convert the fruit into a manufactured product are: salting (brining), fermenting, crushing, extracting, straining, or filtering, centrifuging, canning, freezing (quick freeze process), dehydrating and evaporating (applicable only to apples), and grinding. He regards dehydrated apples, but not other dehydrated fruits, as a [fol. 126] manufactured product. Such conclusion is predicated on the fact that the apples are peeled, cored, sliced, and treated with sulphur solution or gas spray, and dried with artificial heat, for the most part in commercial establishments. Other fruits are customarily dried naturally or artificially on the farm. The quick-freeze process as applied to fruits generally involves the addition of ingredients, such as sugar or syrup. If ingredients other than the fruit

are added, the frozen mixture is considered by him to be a manufactured product, otherwise not.

The testimony presented by other individuals and representatives of a number of organizations regarding the practices in the vegetable and fruit industry is substantially similar to that outlined above. Considerable additional evidence, however, was presented by other persons relative to the necessity for certain of the treatments mentioned above and for packaging.

Brushing, washing, waxing, and similar treatments are said to be necessary to remove all or most of the decay-producing organisms from the surface of the produce. Fresh fruits and vegetables, which are living plant organisms, are usually harvested before reaching full maturity. Therefore, it is of vital importance in the preparation for market that conditions be created and maintained to retard maturity, and simultaneously prevent excessive deterioration, shriveling, wilting, and bacterial decay. One of the measures is to place the produce in containers to facilitate better handling and prevent bruising. Plastic transparent over-wraps aid in protecting the produce from contamination with micro-organisms throughout the channels of distribution. At the same time most plastic over-wraps are permeable to gases, thus allowing the produce to breathe. Another protective measure is refrigeration which serves to reduce the activity of decay-producing organisms and [fol. 127] to retard the rate of growth in fruits and vegetables. These persons, generally, are of the opinion that so long as the fruit and vegetables are living organisms, they are agricultural commodities and not manufactured products thereof. Whenever life is extinguished, however, it is said that the fruit or vegetable is no longer a living commodity. In this connection, one person explained that in the case of dried fruit, for example, the organisms are not dead—they are inhibited; but in the case of dehydrated carrots there is no plant life. He also expressed the view that chopped or shredded vegetables are still living organisms and hence would fall in the category of an unmanufactured product.

There is a growing demand on the part of the public that fresh produce be properly prepared for consumer use, and

southern agricultural interests are constantly endeavoring to get farmers to follow the best marketing practices. There is a greater demand, for example, for the grading and defuzzing of peaches; the waxing of cucumbers and melons; and the grading and washing of potatoes and other commodities. Commodities so processed generally bring a better price on the market than similar commodities not so treated. In this connection, the marketing board of one southern State has found that if the produce is not properly prepared, there would be no sale.

A professor of marketing at Ohio State University, whose field of specialization, since 1919, embraces marketing facilities, transportation, grading, standardization, packaging, prices, costs of marketing, and more recently the packaging and marketing in consumer units, testified as to packaging practices. He stresses the importance of packaging fresh fruits and vegetables to insure delivery in good condition from producer to consumer. Containers for such produce have improved from time to time and many new and improved types have appeared in recent years. Now [fol. 128] in use are containers made of wood, fibre, paper, and plastics. Tough transport films are widely employed in consumer unit packages. For example, cranberries are now packed at shipping points largely in 1-pound cellophane bags. In connection with the prepackaging of spinach, the vegetable is brought to the packing plant in baskets which are emptied on to a moving belt, the unfit parts being removed by hand. The spinach is then washed, following which the excess moisture is removed by centrifugal force. It is then placed by hand into cellophane or similar-type transparent bags and check-weighed. The bags are, then, sealed by heat or other means and placed into cartons.

Packaging in wooden boxes has long been customary on the farm, in the packing house and at many other steps in the marketing process. Corrugated paperboard is now being used to manufacture boxes in which apples are shipped to market. The "Friday" tray, a container made of paperboard dividers to keep each fruit in a separate compartment, is now being used in the apple trade.

Packaging is said to be done only for the broad merchandising purposes of protection, convenience, standardization,

and identification, irrespective of the size or type of container used or the places where the packaging occurs. Consumer packaging commenced some time prior to 1935 in connection with such farm produce as apples, potatoes, dry onions, citrus fruits, and even tomatoes, and spinach. The present trend is to extend the practice to other highly perishable products. The basic reasons for this trend are: (1) that smaller units handle easier; (2) they help to reduce damage and losses; (3) they permit reduced shipping weights and volume; (4) they are suitable for branded and labeled self-service; and (5) they improve sanitation and help to prolong freshness and palatability of the products. [fol. 129] Consumer packaging in small, moisture-proof containers is now being widely employed. It is done to some extent on the farm, but most of it takes place after arrival at terminal markets. Substantial progress, however, is being made in the direction of "moving this job back to the farm."

Other evidence pertaining to local packaging practices was presented by representatives of the various States, State agencies, associations of growers, shippers, and others. Briefly, citrus fruits are handled from the field to a farmers' cooperative packing house,[17] in the same State where, after the fruit is washed, polished, sized, graded, and color added, it is placed in several different types of containers. A consumer-type package such as used for oranges has been in use for 25 years. Since 1934 growers and shippers of celery have tied "celery hearts in bunches," and wrapped them in parchment or cellophane for shipping. Today celery is marketed in various sized crates, in cellophane or parchment wrapped bundles; and in boxes with cellophane windows (one to three bunches in a box) as a consumer package. Corn is marketed fresh in bags, crates, and to some extent in consumer-size boxes, including cellophane window boxes. The latter-type packages contain husked corn.

Experimental prepackaging is being conducted on a farm in Florida by an association of growers in order to determine the feasibility of prepackaging at the farm. Last

[17] The cooperative does not buy the fruit but it is said to remain its property until it reaches the terminal market.

year this plant prepackaged for consumer use—the containers were cardboard trays over-wrapped with cellophane—sweet corn, broccoli, cauliflower, and tomatoes. The prepackaged items were shipped directly to chain stores, wholesalers, brokers, and others by private carriers and exempt motor vehicles.

[fol. 130] A packer of fresh vegetables in Baltimore, Md., purchases vegetables in many different States. With respect to spinach, which is the principal item handled, the grower separates the leaves, but the packer performs the other processes, such as washing, etc., and packaging. Seventy-five percent of the spinach is placed in cellophane bags in the manner previously described. The outbound shipments of consumer-packaged spinach, which frequently moves in the same load with spinach packed in baskets, is transported in exempt motor vehicles. Spinach is produced in large volume in Virginia and is hauled to plants [18] built in spinach producing areas, as for example, Norfolk, Va., where it is washed and packaged in cellophane bags or in bushel baskets. In the Norfolk area, the washing, trimming, and grading of spinach and certain other vegetables are customarily done by a majority of the large growers and by several county produce haulers. These processes, including packaging, are now being performed generally in the area of production as most growers regard their chances of obtaining equitable returns improved by so doing.

In the southern States, and in New Jersey most of the fruits and vegetables are packed in conventional-type containers on the farm or at nearby packing plants. Growers of blueberries, however, place the berries in pint containers overwrapped with cellophane. Strawberries also are packed in consumer-size containers. There is also some consumer-packing of corn and peaches in certain of these States. A major portion of the farm produce in these States moves initially from the farm to packing houses, farm cooperatives, or State markets located in the respective States in which the produce is grown.

[fol. 131] Apples generally in the various areas in which grown are placed in wooden bushel boxes or baskets as

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[18] Growers largely supply the capital necessary for the erection of these plants.

they are harvested. They are packed on the farm and in commercial packing plants. When they are washed, the natural wax on the apples is dissolved, and Nujol oil is now used largely in an attempt to restore the wax. The wax neutralizes gases given off by the apples, and in the absence of a wax coating, scald would appear. In the Pacific northwest each apple is wrapped separately to protect it, placed in uniform boxes, and then put in cold storage.

As early as 1910, to some extent apples were placed in consumer units (small cardboard containers) holding 8 to 10 apples. Numerous growers and shippers now package apples in 2- and 5-pound mesh bags or other small containers. Some experimental work is being performed with a consumer-size package made of cardboard with a cellophane window. Packaging of this type is done usually at terminal points.

Alabama has a State Market Board which was created to assist farmers in the growing and preparation of their products for market. Through this medium numerous plants have been established in this State to which the growers bring their fruits and vegetables and other products to be graded and prepared for market. Although Alabama does little consumer packaging at present, more and more emphasis is being placed on this practice and the State representative believes that this method of marketing will soon be on the increase.

The examiner concluded that fruits, berries, and vegetables which remain in their natural state (but not frozen or quick frozen), including vegetables shredded or chopped-up and mixed irrespective of the processing performed in preparing the commodities for any market or the manner in which packaged, so long as they are not placed in hermetically sealed containers, are unmanufactured agricul- [fol. 132] tural commodities within the meaning of section 203 (b)(6). Certain of the exceptants contend that the examiner's finding in respect of (1) prepackaged, shredded vegetables and those chopped-up and mixed, and (2) vegetables, dried naturally, and fruits and berries dried naturally or artificially, is erroneous.

We think it clear that such treatments or operations as harvesting, washing, cleaning, sorting, grading, polishing, and the various other described non-manufacturing treat-

ments accorded fresh fruits and vegetables, other than those discussed below are not such as to constitute the items manufactured products of agricultural commodities. The commodities so treated are, when marketed, substantially the same as when harvested. With respect to sliced, shredded, and chopped-up fruits or vegetables the situation is different. The border-line nature of such items is clearly indicated by the fact that the scientists who appeared at the hearing are not in agreement as to the proper category, as between manufactured and unmanufactured, in which these products shall fall. In our opinion, these products have been so changed in form from the vegetables produced on the farm as to remove them from the category of unmanufactured agricultural commodities. And for reasons stated later herein, under the discussion of nuts, we conclude that shelled vegetables also are manufactured products.

As concerns dried fruits, these articles are customarily dried naturally on the farm and differ in composition from the fresh fruit only to the extent that a large portion of the water content is removed. No sound distinction can be made between the natural and artificial drying of most fruits as the resulting product is the same. We do not believe that under the foregoing definition of "manufacture" that dried fruits may properly be considered as falling in that classification. For similar reasons, the conclusion is justified that vegetables, dried naturally or artificially also are unmanufactured agricultural commodities. [fol. 133] Dehydrated vegetables, however, differ from those dried naturally in that the former are blanched or scalded prior to dehydrating, thus inactivating or killing the enzymes, and the vegetables are no longer living entities. Dehydrated vegetables therefore do not come within the exemption.

Although no one questions the examiner's conclusion that frozen or quick-frozen fruits and vegetables are manufactured products, in view of certain questions raised respecting other frozen commodities, some discussion of these items will be helpful. The quick freezing of fruits involves the addition of other ingredients, principally sugar or syrup. Since a "combination" results, it follows, in light of the foregoing definition of "manufacture" that quick-

frozen fruits are manufactured products. In the quick-freezing of vegetables, the commodities are customarily blanched or scalded prior to freezing, and sometimes ascorbic acid is added, thus enabling the product to be held in that condition until ready for use. In the circumstances, the frozen vegetables cannot be said to be in their natural state. We conclude that they too are manufactured products.

[fol. 134] *Cereal Group*

The various cereals of importance grown in the United States are wheat, rye, oats, barley, flax, rice, buckwheat, corn (including maize), and sorghums. The treatments accorded wheat and rye are combining, harvesting, shocking, stacking, threshing, cleaning, and grinding. Buckwheat is harvested, shocked, threshed, and cleaned; and corn is harvested, shocked, husked, artificially dried, shelled, and ground. The other listed cereals are processed in the same manner as indicated for wheat and rye, except that oats and flax are not ground; barley is not cleaned; rice is not ground but is artificially dried; and sorghums, in addition to the other treatments listed for wheat, are headed and crushed.

The modern combine cuts off the heads of grain plants, threshes and cleans the grain, and pours the kernels directly into a conveyance of some kind for movement from the field to storage. Sometimes the kernels are placed in bags in the field. In the last few years, rice has usually been harvested with a combine before the grain is fully dry in the field. The universal practice in California now is to take the grain direct from the combine in the field to a drier where the moisture is brought down to safe levels before it goes to storage. Corn is husked mechanically and by hand. Although corn and rice are frequently dried by artificial means, this does not kill their viability if properly applied. Corn is shelled by a mechanical process on the farm and at local elevators. It has historically been common practice on the farm to grind much of the grain before it is fed to livestock, in order to make it more digestible, but none of the grain so ground moves in interstate or foreign commerce.

The scientist testifying with respect to the cereal group

does not consider that a mixture of the grains, even if ground together (provided no vitamins or other ingredient is added) would result in a manufactured product. Nor [fol. 135] does he believe that any of the other above-mentioned treatments or processes convert the items into manufactured products. He lists as unmanufactured agricultural commodities the following: whole or ground, wheat, rye, oats, barley, flax, corn, sorghums, rice, straw, corn and sorghum fodder, corn cobs, and stover.

Treatments described as converting the commodities into manufactured products are: dehulling, crushing, (flax), milling, malting, brewing, distilling, pearling, extracting, popping, parboiling, rolling, or evaporating. The last-mentioned process applies only to sorghums; and only oats and rice are dehulled. Unlike wheat, in which the hull or chaff is removed in the threshing operation, the hulls of rice adhere tightly to the kernel after threshing and a separate, much more complicated, process is required to remove the hulls. The removal of the hulls, which is the first process in preparing rice for the milling operation, leaves what is usually called brown rice. White rice, regarded as a manufactured product, is obtained by a further processing referred to as a polishing operation, which removes the "brown" coat. When oats are used for making oatmeal or other products, the hulls are removed from the kernel. Pearling is a mechanical process of abrasion or rubbing by which the husk or chaff is removed from barley. Milling, considered by the scientist to be a manufactured process, is said to be distinguished from grinding, by reason of the fact that in the case of the former, the grain must be carefully tempered to get the right amount of moisture in the bran oats without giving it time to penetrate the center of the kernel. Milling is not just a grinding of a coarse grain; rather it is a much more technical process consisting of the breaking of the grain so that the outside bran may be separated from the endosperm which is ground into flour. The scientist considers the following to be manufactured products: flour, including meal, rolled oats and barley, [fol. 136] pearled barley, malt and malt liquor, distilled liquors, brewers grain, sorghum syrup, corn syrup, starch, rutkin (from buckwheat), popcorn, parboiled rice, breakfast cereals, linseed oil, and malted foods.

The examiner concluded that whole wheat, rye, and oats, including those dehulled, barley (including that pearled), flax, corn, sorghums, rice, shelled corn, sorghum fodder, and stover are unmanufactured agricultural commodities. Only the rail carriers except to this finding, contending that dehulled oats, dehulled rice and pearled barley are manufactured products of agricultural commodities for reasons substantially similar to those stated by the scientist. We agree with the scientist that dehulled oats and rice and pearled barley are manufactured products of agricultural commodities. The removal of the hulls or husks, which apparently is done preliminarily to a further manufacturing operation—probably at the same plant or in the vicinity thereof—changes the articles into manufactured products. We conclude that the questioned commodities are manufactured products of agricultural commodities. The conclusions of the examiner in respect of the cereal group are not otherwise questioned and except for a slight modification of the commodity descriptions to conform with the evidence, we deem them proper.

Forage Crops Group

Forage crops include the basic commodities alfalfa, soybeans, mungbeans, grasses, and other legumes such as vetches, field peas, clovers, lespedesias, and similar crops. The treatments accorded alfalfa, soybeans, and those crops designated as "other legumes" are harvesting, drying (field barn), chopping, dehydrating, baling, and ensiling. Additionally, the treatment "sprouting" applies to soybeans. Mungbeans are harvested, threshed, cleaned, inoculated, bagged, and sprouted.

[fol. 137] All of the forage crops used for feed generally are dried, either in the field or barn, prior to storage. Drying is necessary before the commodity can be marketed. Machinery is used for the chopping and dehydration of hay, the common term applied to the dried forage crop. Some dehydration is done on the farm, but the dehydrated hay does not appear to differ materially from hay dried naturally. The scientist, who presented evidence in respect of the above-captioned group, does not consider the products resulting from the described treatments to be manufactured. Based on the foregoing evidence, he believes the following

to be unmanufactured agricultural commodities: any forage loose or baled hay such as timothy, alfalfa, mixed, etc., chopped hay, and dehydrated chopped hay. Treatments which he deems to be manufacturing are crushing, fermenting, blanching, mill grinding, pelleting, extracting, and canning. Pelleting is the process by which certain of the named crops are dried, ground, and mixed with an adhesive and compressed into small pellets.

The examiner concluded that any forage loose or baled hay, chopped hay, and dehydrated chopped hay are unmanufactured agricultural commodities. The rail carriers contend that the chopping of hay is not necessary for the marketing of hay. No question is raised concerning the designation of naturally dried hay as an unmanufactured agricultural commodity; and there appears to be no difference in the hay, whether it is dried naturally or artificially. As stated, some dehydrating is performed on the farm. It does not appear that dehydrated hay differs in any material respect from that dried naturally and we conclude that it is an unmanufactured product. But hay which is chopped up fine must be regarded as a manufactured product in light of the approved definition. We conclude that forage and hay, whether naturally or artificially dried are unmanufactured agricultural commodities.

[fol. 138] *Nut and Peanut Group*

The basic agricultural commodities considered in this group are: almonds, chestnuts, filberts, pecans, walnuts, tung nuts, pistachio nuts, and peanuts. The treatments accorded pecans and walnuts are harvesting, hulling, drying, cleaning, polishing, bleaching, grading, sorting, coloring, packaging, refrigerating, and shelling. Similar treatments, with the exceptions hereinafter noted, are given the following commodities: almonds, except polishing and coloring; chestnuts, except polishing, bleaching, and coloring; filberts, except coloring; tung nuts, except polishing, bleaching, grading, sorting, and coloring; pistachio nuts, except shelling; and peanuts, except hulling and coloring. Additionally, peanuts have to be dug, stacked, and picked.

Peanut vines with roots and adhering nuts are stacked in the field for the purpose of drying. Various other treat-

ments accorded peanuts, as hereinafter described, are said to be substantially the same for other nuts. After the peanuts are removed from the vine it is sometimes necessary to dry them further in order to reduce the moisture content. Usually this is done by air drying at the point of production. The nuts are then cleaned and usually sold to the sheller, who removes the shells in a machine operation. Peanuts are also sold in the shell to warehousemen, cooperatives, and others. The shelling plants are usually located in the immediate area of production. Only one variety of peanut is sold to the retail trade in the shell. This species is produced in only one area and the volume of peanuts that move in an unshelled condition to the principal markets is less than 10 percent of the total production. All of the Spanish peanuts, which are grown in the southeastern and southwestern sections of this country, are marketed by the shelling plants without shells. More than 90 per cent of all peanuts produced are used in the manu- [fol. 139] facture of peanut oil, peanut butter, or roasted to be packaged as salted peanuts or to be used as an ingredient of confectionery and bakery products. The principal purpose of shelling prior to shipment to plants where other products are made is to reduce the shipping space required and to make for more convenient handling.

The peanut kernel, after shelling, is encased in a fine brown membrane which is removed by blanching. Prior to blanching, the peanut is a living entity, and if planted will grow. After blanching, however, it is no longer a living entity. In the opinion of the scientist, who testified in respect of the nut group, neither the removal of the outer shell of the peanut or the other nuts, nor the treatments prior to shelling, render the article a manufactured product. Similarly, he regards any treatment of imported nuts such as Brazil, cashew, and cocoanuts, up to and including shelling, as not changing the nuts from an agricultural commodity. In his view the shell of a nut, like the hull of a cottonseed, is a by-product of treatments designed to obtain, in the case of cottonseed, the seed itself, and, in the peanut, the kernels encased by the shell. The raw shelled peanuts do not become useful, except where used

for seed,[19] until they have been further processed after leaving the shelling plant. Unlike peanuts, which move from the shelling plant to various manufacturers, the other nuts named are used largely as direct foods, and except as indicated below they are not usually otherwise manufactured. The various nuts are considered by the scientist to be manufactured if they are blanched, roasted, ground or pressed, or if extraction is involved, as in the case of tung nuts. Additionally, the grinding of shells is deemed to be manufacturing.

The scientist believes that the following items are unmanufactured agricultural commodities: almonds, black walnuts, and filberts in the shuck or husk, in the shell, and [fol. 140] shelled fresh;[20] Brazil nuts, cashew nuts, and chestnuts in the shell and shelled fresh; cocoanuts, in the husk and in the shell; copra; English walnuts, in the husk, in the shell, and shelled; hickory nuts, in the shell; pecans, in the shell and shelled; pistachio nuts, in the husk and in the shell, fresh; and raw peanuts, in the shell and shelled. He regards as manufactured products any of the nuts which are canned, blanched, salted, or roasted.

The examiner concluded that raw peanuts, shelled or unshelled, and other nuts, shelled or unshelled, to which nothing has been added, are unmanufactured agricultural commodities. In addition to the contentions generally stated heretofore, exceptants contend that the shelling involves the use of expensive equipment and is the first step in a manufacturing process; and that the shelled nut, which does not resemble the nut in the shell, is therefore a manufactured product. Certain of the repliants argue that whether or not expensive equipment is used is not a proper criterion for determining whether a commodity is manufactured; that the shelling is only a preparatory treatment to shipping to manufacturers; and that the mere removal

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[19] Farmers either purchase the kernel from the shelling plant or shell their own peanuts for seed purposes.

[20] The term "fresh" as here used includes nuts that have been cured with or without artificial heat that may have been stored in their natural state or shelled, but which have not been cooked, blanched, salted, or ground.

of the shells from peanuts and other nuts does not constitute manufacture.

In *Interstate Commerce Commission* v. *Weldon*, 90 Fed. Supp. 873, we sought to enjoin the defendant Weldon from transporting raw shelled peanuts in interstate or foreign commerce for compensation without a certificate. Weldon contended that he did not require authority to engage in such transportation as the raw shelled peanuts are agricultural commodities within the meaning of section 203 (b)(6). [fol. 141] The court described the elaborate machinery and processing involved in the shelling operation and held that the shelling changed the peanut into a manufactured product. In light of the above definition of the term in question, we conclude that raw shelled peanuts are not an agricultural commodity within the meaning of section 203 (b)(6). For similar reasons, a like conclusion is reached in respect of other shelled nuts. There is no question that the other treatments described as non-manufacturing are such as to remove the commodities from the approved definition.

Fiber Crop Group

The basic agricultural commodities comprising the fiber crops are cotton lint and linters, cottonseed, ramie or China grass, flax fiber, flax seed and hemp. Cotton is picked by hand and to some extent by machinery. It is then taken to a gin where the seeds are separated from the cotton. Although the grower usually retains ownership of the ginned cotton, the bulk of the cottonseed generally is retained by the ginner in payment for the ginning. The cotton is next baled and frequently compressed to save shipping space. The ginner sells the cottonseed to oil mills, where small particles of lint are removed by the same process as that used in the initial ginning. Cotton linters are used in the making of mattresses, smokeless powder, rayons, cellulose, and other articles. Next the hulls, which are used largely for feed on the farm, are removed from the seeds and the remainder of the seed or kernel is pressed and oil is extracted. The "cake" remaining is ground into meal and is used as an ingredient in mixed feeds. None of the several persons who submitted evidence with respect to fiber crops, considers such operations as harvesting, ginning, baling,

or compressing as converting the cotton lint and linters to manufactured products.

There are two types of flax, one produced for the seed with a limited use as fiber, and the other produced as a fiber crop. Flax fiber is used in the manufacture of paper and other items. Hemp produces fiber used for making rope. The various operations or treatments accorded the named basic commodities, which the Department scientist [fol. 142] regards as non-manufacturing are harvesting, ginning, scutching—a mechanical process for cleaning fibers—and baling. All of such processes are said to be necessary in order for the farmer to dispose of the commodities. Machinery is necessary for all such operations, except for minor variations which are or may be done by hand. The spinning, weaving, or finishing (bleaching or dyeing) of the cotton lint or linters and the various fibers, and the crushing of cottonseed for oil, are considered to be manufacturing operations. The scientist regards as unmanufactured agricultural commodities the following: cotton lint and linters, cottonseed, ramie fiber, flax fiber, flaxseed, and hemp fiber. He deems other products, such as cotton yarn, cottonseed meal, ramie yarn, and hemp rope, to be manufactured products. He also believes cottonseed hulls to be a manufactured product since they do not constitute a raw material from which other products are manufactured. Representatives of a cotton producers' association take an opposite view, pointing out that the hulls are used largely for feed on the farm.

The examiner concluded that cotton lint and linters, cottonseed, cottonseed hulls, ramie fiber, flax fiber, flaxseed and hemp fiber, are unmanufactured agricultural commodities. Congress clearly indicated that ginned cotton and cottonseed were to come within the partial exemption. The lint is separated from the seeds in the ginning process and later baled. We conclude that cotton in bales or in the seed, and cottonseed are agricultural commodities within the meaning of the act. A different conclusion is reached, however, in respect of cotton linters and cottonseed hulls. The linters are not in their natural state, and the cottonseed hulls are a by-product of a manufacturing operation, namely the extraction of oil from cottonseed. We conclude that cotton linters and cottonseed hulls are manufactured products.

[fol. 143] With respect to ramie fiber and hemp fiber, the scientist compares the processing thereof to the ginning and baling of cotton, in that the ginning and the baling of these fibers is necessary in order for the farmer to dispose of them. In the circumstances, and since these fibers are in their natural or raw state, we conclude that they are unmanufactured agricultural commodities. No exception is taken to the examiner's finding in respect of flax fiber and flaxseed. No change occurs in these commodities as a result of the previously described non-manufacturing treatments, and we conclude that they are unmanufactured agricultural commodities.

[fol. 144] Tobacco and Special Crop Group

The basic agricultural commodities in the above-captioned group considered by the scientist testifying with respect thereto, and the treatments, regarded by him as non-manufacturing, accorded each commodity, are:

Tobacco leaf—picking, cutting, field drying, barn drying, baling, stripping, sorting and redrying.

Hops—picking, cutting, barn or kiln drying, and baling.

Mint oil (crude)—cutting of the mint plant, field drying, and crude oil extraction.

Castor Beans—picking, barn or kiln drying, and threshing or combining.

The above-described processing of tobacco, with the exception of redrying, is performed on the farm. In "farm drying" tobacco, the commodity is left in the field for a day or so until part of the water content is removed and the leaf is wilted. This is done largely to facilitate handling. The tobacco leaf is then removed into a barn where it remains until dried naturally. In some instances heat is applied to accelerate drying. When the tobacco leaf is dried it is shipped loose or in bunches. Cigar-type tobacco is harvested by cutting the entire stalk and after drying the leaves are pulled from the stalk and usually baled. Redrying is a method of standardizing the moisture content of the tobacco and is never done on the farm. It is usually performed at a central assembly point. In this process the

tobacco is run through a redrying plant where the moisture is removed by mechanical means and a certain amount of moisture is thereafter added to the extent necessary for packing. Although the scientist regards the redrying of tobacco as a non-manufacturing treatment, as will be noted hereinafter, he classifies the product, namely, "redried hogshead packed leaf" as a manufactured product. His [fol. 145] conclusion is based on the fact that the product "is not any longer tobacco leaf." Other treatments accorded tobacco leaf and regarded by the scientist as manufacturing, are blending, stemming, aging, and fermentation.

Mint oil is oil that is volatilized usually from peppermint or spearmint plants, and is condensed by lowering the temperature to ordinary air temperature conditions. The oil is volatilized by the application of steam. The mint plants as such are not the marketable commodity; rather the oil is the marketed item. Ordinarily the mint oil is extracted on the farm.

The agricultural commodities considered by this scientist to be unmanufactured are: Loose leaf tobacco, cigar tobacco leaf (baled), baled hops, crude mint oil, and castor beans. He deems the following to be manufactured products: Any redried hogshead packed leaf; case packed or fermented leaf; hop oil or lupuline; blended, redistilled or fractionized mint oil; and castor oil, castor cake, and castor meal.

The examiner concluded that tobacco leaf, redried tobacco leaf, hops, and castor beans are unmanufactured agricultural commodities, and that mint oil is a manufactured product. Certain of the exceptants contend that it was error to so classify redried tobacco leaf because such conclusion is contrary to the evidence and to the applicable law. They argue that the redrying process preserves an otherwise perishable commodity and that the natural tobacco leaf is materially altered thereby. The question of whether or not redried leaf tobacco is an unmanufactured agricultural commodity undoubtedly is a close one. But we are impelled to the conclusion that the characteristics of the dried [fol. 146] tobacco leaf have been altered to such an extent as to remove the resulting product from the category of an unmanufactured agricultural commodity. No exception is taken to the other agricultural commodities classified by the examiner as unmanufactured, and we agree therewith.

Seeds

Several of the scientists presented evidence relative to the processing of various types of seeds. The treatments applied in the processing of vegetable seeds are threshing, cleaning, picking, and blanching. In addition to threshing and cleaning, seeds of the forage crops, such as alfalfa, red clover, white clover, etc., are fumigated, inoculated, deawned, and scarified. Safflower seed, and mustard seed are picked and threshed; and sunflower seeds are picked, barn or kiln dried, and threshed. The term "picking" involves the removal of defective seeds or of foreign matter from dried seeds. Inoculating, which is generally done on the farm, refers to the treatment of seed with cultures of nitrogen-fixing bacteria prior to planting. Deawning is a process by which the adhering portions of the plant are removed from the seed. Scarifying consists of a treatment that scratches or wounds the seed coat, and improves the germination of certain types of seeds. The two processes last described are customarily performed by commercial seed handlers. Seeds of the forage crops are bagged in paper, burlap, and other types of containers, but not in small consumer-size packages. The other seeds are placed in small packages for consumer use, as well as in larger packages. None of the foregoing treatments is deemed by the scientists to alter materially the natural seeds and they are of the view that the seeds remain unmanufactured agricultural commodities.

[fol. 147] Further processing of the seeds, such as the extraction of oil from safflower and sunflower seeds, admittedly constitutes the resulting articles manufactured products. Boxed mustard seed, such as prepared for condiment use, also is regarded as a manufactured product, as the characteristics of the seed have been changed by blanching or sterilizing. This seed, if planted, will not grow.

The examiner concluded that seeds, including those ready for planting or packaged for consumer use (except mustard seed or other seeds prepared for condiment use), are unmanufactured agricultural commodities. One of the exceptants contends that "seeds packaged for consumer use" are manufactured products of agricultural commodities. In our opinion, seeds which have been deawned or scarified,

as well as those which are prepared for condiment use (but not those seeds which have been inoculated) have undergone such a degree of processing that they have been changed from a raw product of the farm to a finished or manufactured article. We conclude that such seeds are manufactured products of agricultural commodities.

Poultry and Livestock Groups

Poultry Group.—The basic commodities comprising the poultry group are chickens, turkeys, ducks, geese, squabs, feathers and eggs. The various treatments accorded chickens preparatory to marketing are: killing, scalding, picking, drying, waxing, pinning, singeing, washing, cooling, grading, eviscerating, cutting up, packing, freezing, and storing. The same treatments with the exception of drying and waxing, apply to turkeys, and with the exception of [fol. 148], scalding, drying, and waxing, ducks and geese undergo the same treatment as those applied to chickens. Squab are killed, picked, washed, cooled, graded, eviscerated, packed, frozen, and stored.

The killing of chickens and turkeys is accomplished in the main by wholesalers, but the practice of killing on the farm is said to be on the increase, particularly in commercial producing areas. In the larger plants, the fowls are killed by machinery. Scalding is usually effected by dipping the poultry into large tanks of hot water and dragging the fowls through the tank by means of an overhead chain; or it may be done by subjecting the poultry to a series of hot water sprays. Picking is done both by machinery and by hand. Some hand picking is usually necessary in order to remove pin feathers and hair, although this may be accomplished by the application of hot wax; when the wax method is used, it is necessary to dry the fowl before applying the wax. After removal of the wax the fowls are cooled by appropriate means, graded, and packed in barrels or crates and covered with ice for shipment. In some instances waterproof paper is placed in the barrels and always when crates are used. In many instances the various treatments described are rendered at plants owned and operated by farm cooperatives. Turkeys and chickens are sometimes wrapped in cellophane for marketing, thus preventing evaporation.

The practice of cutting up poultry into different parts for the consumer trade is increasing and is done on the farm to some extent.

Producers of ducks on Long Island, N. Y., are organized and carry on all of the marketing operations including the freezing and storage of such fowl. The method of removing feathers from ducks and geese differs somewhat from that of chickens because the feathers of the former are saved for other uses. Accordingly, particular pains are taken to keep the feathers clean and dry.

[fol. 149] The scientist testifying with respect to this group does not consider any of the above-described treatments or practices, including freezing, to be manufacturing. He pointed out that the freezing of poultry by the quick-freeze method or otherwise, does not change the nature of the poultry in any way except to harden it. When thawed out, it remains a fresh fowl. Freezing merely enables the fowl to be kept for a long period. Such treatments as smoking, cooking, and canning, however, are said to cause the fowl to become a manufactured product. In the smoking process, some type of curing liquid is added, and the bird is actually cooked and therefore, is a manufactured product.

Feathers are collected, washed, graded, dried, stored, salted, and packaged. Most feathers originate in poultry killing plants but there are many poultry farmers who do their own killing and they are beginning to accumulate more feathers. Feathers treated in the manner described are not deemed by the scientist to be a manufactured product as no change in the commodity has occurred. Additionally, feathers (including hackles, down, quills, and fiber), of different density are separated by means of an air floatation process. Chicken down and fiber are obtained by application of this process to ground-up feathers. Because of the grinding process, these items are considered by the scientist to be manufactured products. But down from ducks or geese is obtained merely by means of the floatation process and hence is regarded by him as an unmanufactured agricultural commodity.

Eggs are collected, washed, graded, oiled, stored, and packaged. Considerable evidence respecting the oiling of

eggs was presented by two Department scientists and by a representative of a motor carrier. The oiling of eggs [fol. 150] merely involves the dipping of the egg into a colorless, odorless, and tasteless mineral oil, the object being to preserve the original quality of the egg. According to the scientists, this method is used widely by farmers. Through experimentation, one of the scientists has found that oil-dipped eggs, after being in storage at temperatures ranging from 29 to 32 degrees Fahrenheit, compare favorably with fresh eggs. In this connection, he pointed out that a high percentage of deterioration of a fresh egg occurs during the first 24 hours after the egg is laid and that unless it is stopped by oiling or some refrigerating process, the egg after 48 hours will "look poorer" than one in storage 3 months. Neither of the scientists regards the oiling of eggs as affecting the character of the egg, nor are the other treatments considered such as to alter the eggs in any respect.

The breaking and freezing, or the dehydration of eggs are said to convert the eggs to manufactured products. The breaking of the shell, which is done by hand, makes the egg much more perishable. Although the breaking is regarded as one step in a manufacturing process, standing alone, it is said not to constitute manufacturing. Whole eggs (shells removed), or the separated yolks and albumin, are quick frozen at commercial plants and stored; they are also dehydrated at similar points. The scientist testifying in respect of this phase of processing expressed the view that the frozen and dehydrated eggs are manufactured products.

Summarizing, the scientists conclude that the following items are unmanufactured agricultural commodities: chickens and turkeys, New York dressed drawn, eviscerated, cut-up, or frozen; ducks and geese, New York dressed, eviscerated, cut-up or frozen; squab, dressed, eviscerated, or frozen; eggs, whole eggs; feathers, hackles, down from [fol. 151] ducks and geese, and quills. Certain items considered to be manufactured products are: chickens and turkeys, smoked, cooked, or canned; ducks, geese, and squab, cooked or canned; frozen whole eggs, frozen yolks, frozen albumin, dried egg powder, dried egg yolks, dried egg albumin, and chicken down and fiber.

A motor carrier representative explained that in Minnesota eggs usually move from the farm to one of the numerous packing plants in that State, where they are cooled, graded and candled. During April, May and June, 80 percent of the eggs shipped out of Minnesota are oiled. The eggs are then placed in cases. The grading is now done extensively by machinery. In the opinion of this person, the eggs become a manufactured product after being processed in the packing plants.

The examiner concluded that the following are unmanufactured agricultural commodities: (1) chickens, turkeys, ducks, geese, and squab, alive or killed, picked, drawn, cut-up, frozen or unfrozen, (2) feathers, hackles, quills, and down from ducks and geese; and (3) eggs, including whole eggs and oiled eggs, but excluding frozen or dried eggs, and frozen or dried egg yolks and albumin.

A number of the exceptants assail the examiner's finding with respect to the items embraced in (1) above. They contend that this finding is contrary to previous decisions of division 5, and that the conversion of a "live inedible fowl" into "a dead edible fowl" satisfies the definition of the word "manufacture" as laid down by the courts. They argue that if dressed poultry is to be considered an unmanufactured agricultural commodity then fresh meat and meat products should be accorded a similar classification. Certain of the parties contend that the processing of poultry does not differ materially from the treatments accorded fresh vegetables in the freezing process, and that since [fol. 152] the latter are deemed to be manufactured products, no distinction should be made in the case of dressed poultry. Repliants say that dressed poultry still has all of its original characteristics except those which have been removed in the dressing process, and that the classification of this commodity as an unmanufactured agricultural commodity is proper.

The words "agricultural commodities (not including manufactured products thereof)" do not include ordinary livestock as the latter are separately mentioned in section 203 (b)(6). Section 20 (11) of the act provides that "The term 'ordinary livestock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly

valuable for breeding, racing, show purposes, or other special uses." It necessarily follows that the term as used in section 203 (b)(6) has the same meaning. Livestock, such as race horses, show horses and the like do not come under the classification of "ordinary livestock," and the transportation of animals of this type is subject to the certificate or permit requirements of the act. *Owsley Common Carrier Application*, 31 M.C.C. 778. Poultry, however, are included within the broader description "agricultural commodities". It is clear also that certain products of live animals, such as are embraced in the definition of ordinary livestock, are likewise included; and there is no dispute that wool, at least in the form sheared from the [fol. 153] sheep, is an agricultural commodity. These products are in themselves, basic agricultural commodities, separate and distinct from the livestock. But slaughtered animals are not embraced in the definition of ordinary livestock and we are impelled to conclude that the products thereof, such as fresh meat and meat products, do not fall within the description "agricultural commodities" as used in section 203 (b)(6). It logically follows that neither killed poultry nor any products thereof come within the term under consideration. We conclude that poultry other than that alive is not an agricultural commodity within the meaning of Section 203 (b)(6). Further, we are of the opinion that birds of the air such as doves and pigeons are not agricultural commodities.

[fol. 154] With respect to feathers, hackles, quills, and chicken down, down obtained from ducks and geese, and chicken fiber, as these items are not products of live poultry they do not come within the approved definition of the term in question, and need not be further considered.

The examiner's finding with respect to eggs is challenged by one exceptant on the ground that division 5 has heretofore classified eggs as both dairy and packing house products. *Miller Extension of Operation—Iowa and Illinois*, 43 M.C.C. 577, and *Modification of Permits—Packing House Products*, 46 M.C.C. 23, and 48 M.C.C. 628. The fact of such classification does not establish that the items so classified are manufactured products of agricultural commodities. For instance, in the last-cited case milk also is

classified as a dairy product, although it is clear that Congress intended this commodity to be included in the category of unmanufactured agricultural commodities. Eggs are produced on the farm and are also graded and oiled there. Eggs are oiled merely for the purpose of retaining them in a fresh condition for a longer period of time than would otherwise be possible. The appearance, property, or quality of the egg is not changed. Compare *Emery Transp. Co. Interpretation—Frozen Eggs*, 48 M.C.C. 779. We conclude that eggs in the shell, including oiled eggs, are agricultural commodities within the meaning of section 203 (b)(6). A different conclusion is reached, however, in respect of whole or shelled eggs. The removal of the shell, as in the case of raw shelled peanuts, changes the egg into a manufactured product. No one questions the conclusion with which we agree, that dehydrated and frozen eggs are manufactured products. Such products possess new characteristics, properties, and qualities.

Livestock Group.—The basic commodities comprising the livestock group are hides, pelts, or skins, wool, mohair, and manure. The treatment accorded hides, including [fol. 155] pelts or skins, consist of collecting, washing,[21] grading, drying, storing, salting, and packaging. The same operations or treatments, except salting, apply to wool and mohair. Manure, principally animal droppings, is collected, dried, stored, packaged, dehydrated, and pulverized.

Hides, which are produced largely in commercial slaughtering houses, and to some extent on the farm, are salted merely to prevent spoilage before reaching the point where manufacturing begins. Salting is said not to change the character of the hide. Nearly all hides produced on farms are salted there, or they are sold to a local collector who salts them prior to shipment. Both the green and salted hides move from the farm to curing and tanning plants. Wool and mohair are scoured—usually at some point off the farm—for the purpose of getting it clean by removing fats, oils, and dirt. Wool is first packaged in sacks at the point of production, then shipped to concentration points where the wool is graded and baled. Some grading, however, is done by the producer.

[21] As applied to wool and mohair the term is "scouring".

Manure is dehydrated in order to remove the excess moisture. The dehydration is accomplished by placing the commodity in a "rolling drum" through which hot air is blown. The same result could be achieved by natural drying. After this process, it is pulverized by grinding in order that it may be more readily packaged and spread, but the character of the article is said not to be changed thereby. The two treatments usually take place somewhere near meat packing-houses or major concentration points of livestock.

The scientist testifying in respect of this group does not consider the articles so treated to be manufactured products. The following treatments, in his opinion, would cause the particular commodities affected to become manufactured products: Curing and tanning hides, chemical treating (scouring-carbonizing), spinning or weaving of wool and mohair.

[fol. 156] Wool tops and noils, considered by the scientist to be manufactured products, are the fibers which are derived from the combing process, the tops being the long fibers and the shorter curls are the noils. Combing is said to be part of the manufacturing process whereby fleece is broken down into the various components that enter different avenues of manufacturing to produce different products.

The scientist regards as unmanufactured agricultural commodities the following: Green hides, salted hides, pelts, skins, wool, mohair, clean wool, manure and animal droppings from pens and feed lots. The following are listed as manufactured products: Cured hides, leather, wool fat, tops, and noils.

The examiner concluded that pelts, skins, green and salted hides, wool and mohair, including that scoured, and manure are unmanufactured agricultural commodities. It is our view, and we so find, in light of the approved definition, that pelts, skins, and green and salted hides are not agricultural commodities within the meaning of section 203(b)(6). With respect to wool and mohair, the rail carriers concede that these items packed in grease are unmanufactured agricultural commodities, but they insist that cleaning and scouring of such articles substantially

change their condition and result in manufactured products. We are inclined toward such a conclusion. The scouring is for the purpose of removing fats, oils, greases, and other dirt from the wool and mohair and is the first step in the ultimate change of the raw product to a finished product. We conclude that the cleaning and scouring of the wool and mohair causes a sufficient change in the product to bring these commodities outside of the scope of an unmanufactured agricultural commodity.

Finally, the rail carriers contend that manure from pens and feed lots which is dried or dehydrated, pulverized, and packaged, is not an agricultural commodity since it is not produced on the farm. We do not agree with this rea- [fol. 157] soning. Manure in its natural state unquestionably comes within the partial exemption but the evidence is not sufficiently comprehensive to enable us to determine the point at which the commodity becomes a manufactured product.

Dairy Group

The basic agricultural commodities concerning which a scientist specializing in the dairy field offered evidence are milk, cream, and skim milk. The various treatments or processes which these commodities undergo and which he deems to be non-manufacturing are: For milk—milking, straining, cooling, pasteurizing, homogenizing, freezing, adding vitamin concentrates, standardizing, and bottling; for cream—cooling, pasteurizing, homogenizing, freezing, standardizing, and bottling; and for skim milk—cooling, pasteurizing, freezing, adding vitamin concentrates, standardizing, and bottling.

Pasteurization is a process by which milk is heated to a sufficiently high temperature and for a sufficient time to kill the pathogenic organisms which may be present. This is done to conform to State laws and to make the product safer for human consumption. It is said to change the character of raw milk only slightly, if at all. Very little pasteurizing is done on the farm; most of it is done in dairies located in the various cities throughout the United States. Homogenization, which is done principally in the dairies, is a mechanical treatment which reduces the size of the fat globules in milk and cream. After either or both

of these treatments, the commodity, in the opinion of the witness, remains milk or cream as the case ~~may be~~. Milk is strained merely to remove extraneous dirt and cooling slows down ~~the~~ bacterial action. Freezing, a fairly recent process in the dairy field, causes the water in the milk to form crystals. In reality it is said to be intense cooling for preservation purposes, and if properly done, the milk when thawed has practically the same characteristics as prior to freezing. Standardization is the practice by which [fol. 158] cream is separated from a ~~portion of the whole~~ milk, and ~~skim milk is added~~ to bring the percentage of the milk to a minimum standard in order to comply with certain minimum requirements of the various States.

The "adding of vitamin concentrates," such as for example vitamin "D", merely increases the concentration of components already present in the milk. Although the scientist admits this processing may improve the milk somewhat, he does not consider it to be a manufactured product.

Treatments, which in the opinion of the scientist convert the articles to manufactured products are: The adding of non-milk constituents, churning, concentrating, drying fermenting, and curdling. The first-mentioned treatment causes the resulting article to become a manufactured product because the added materials, such as chocolate, vanilla, and gelatin, are not milk constituents. Concentrating is a treatment by which evaporated or condensed milk is produced. Drying involves concentrating to a degree that the resulting product is solid; fermenting is the process by which culture buttermilk is obtained; and curdling is an essential process in making cheese.

The scientist concludes that the following items are unmanufactured agricultural commodities: Milk, skim milk, pasteurized milk, homogenized milk, frozen milk, vitamin "D" milk, cream, frozen cream, pasteurized cream, homogenized cream, pasteurized skim milk, vitamin "D" skim milk, and frozen skim milk. He lists as manufactured products the following: Chocolate milk, butter, buttermilk, evaporated milk, condensed milk, dried milk, cultured milk, [fol. 159] cheese of various kinds, butter oil, dried cream, devonshire cream, condensed skim milk, casein, lactose,

wheys, ice cream mix, and ice cream. In determining the foregoing classification, he has considered as unmanufactured agricultural commodities those dairy products the characteristic of which have been changed only slightly, if at all, and which are used in the same manner as prior to processing.

The examiner concluded that milk, cream, and skim milk, standardized milk, pasteurized or frozen milk, cream, and skim milk, homogenized milk and cream, and vitamin "D" milk and skim milk, are unmanufactured agricultural commodities. No exception is taken to such finding in respect of standardized milk and raw milk, cream, and skim milk. Certain of the parties contend, however, that pasteurization, homogenization, and fortification should be regarded as manufacturing. They argue that homogenized milk and cream and vitamin "D" milk should be considered manufactured products because the appearance of the milk after such processing differs from that of raw milk in that the cream is not visible.

The legislative history of the act clearly shows that Congress intended pasteurized milk to fall within the partial exemption in question. The other treatments mentioned, such as homogenization and fortification with vitamin concentrates while possibly improving the milk or cream somewhat, do not change the basic character of the commodities in any material respect. The commodities have the same beneficial uses as theretofore. We agree with the conclusions reached by the examiner, except as to frozen milk, frozen cream, and frozen skim milk. It is our view, and we so conclude that these commodities have been so changed as a result of the freezing process as to convert them to manufactured products. The addition of non-milk constituents, such as chocolate, the churning of cream, and the concentrating, drying, fermenting, curdling, etc., of milk, cream or skim milk clearly give to the milk or cream new properties, combinations, or qualities and constitute them manufactured products.

[fol. 160] Forest Group

A scientist specializing in forestry submitted evidence relative to the treatment of forest products preparatory to marketing. An exhibit introduced lists the basic commodities considered and the treatments or processes, regarded by him as non-manufacturing, accorded each. Logs and bolts[22] are felled, bucked, and peeled. In addition to these treatments pulpwood is cut, poles are roofed and gained; and piling is treated. Fuel wood is felled, bucked, and cut. Harvesting is the only non-manufacturing treatment accorded the following: Crude resin, maple sap, bark, leaves, and Spanish moss. Christmas trees and greenery (holly and other greens used for Christmas decorations) are harvested and coated.

Felling, bucking, and peeling are said to be essentially harvesting processes. Logs are steam-peeled upon arrival at the mill. This operation is for the purpose of facilitating sawing. Logs are cut or sawed into smaller pieces for convenience in handling. This operation also is performed in the woods. "Roofing and gaining" refer respectively to the cutting of a ridge at the end of a pole and the cutting of a notch for the cross member which supports wires. Poles or piling are frequently treated with a perservative, such as creosote, to prevent decay. The scientist explained that the "end product" (the pole or piling) is to all intents and purposes the same as it was before treatment, although the treated pole has a greater value than one untreated. Crude resin is harvested by slicing the pine tree with a knife or other tool. Christmas trees are harvested in the woods or on the farms where they are grown, and some-
[fol. 161] times coated by spraying with various materials. This treatment is designed to prevent evaporation, thus keeping the leaves from falling prematurely.

Treatments considered by the scientist to be such as to render the article a manufactured product are: The sawing and hewing of logs; slicing and machining of bolts; chipping and grinding of pulpwood; distilling of crude resin; cooking of maple sap; distilling and cooking of bark; distilling of leaves; weaving of greenery; and retting Spanish

[22] A bolt is a form of log.

moss. If a log is hewn into something that no longer resembles the original log, it is in his opinion a manufactured product.

The scientist lists the following items as unmanufactured agricultural commodities: Logs, bolts, pulpwood, poles, piling, fuel, wood, crude resin, maple sap, bark, wood, leaves, Christmas trees, greenery, and Spanish moss. He deems the following to be manufactured products of agricultural commodities: Lumber, ties, veneer, handles, pulp, paper, resin, turpentine, maple sugar, syrup, bark extract, charcoal, extract, leaf extracts, wreaths, and retted moss.

Additional evidence concerning practices in the production of plupwood was submitted by representatives of certain associations and shippers. Pulpwood is the basic raw material from which woodpulp and paper is made. It is usually cut into 4 or 5 foot lengths for ease in handling. The pulpwood produced in the United States comes from numerous farm woodlots and small timber tracts. Some 260,000,000 acres are in small holdings of less than 5,000 acres, and 86 percent is comprised of tracts less than 100 acres. The total acreage mentioned is owned by approximately 4,250,000 persons, of which the great bulk, or 3,250,000 are classified in the national census as farmers. In 1947, approximately 172,000 acres of tree seedlings were [fol. 162], planted in the United States. Tree seedlings that have been planted to date in this country cover an area of over 6,000,000 acres. In Minnesota, Michigan, and Wisconsin, it is common practice for farmers to produce pulpwood as an adjunct to their farming operations. The great majority of the trucks used for hauling pulpwood is devoted to that purpose or for the transportation of other farm commodities. Approximately 90 percent of the traffic moves intrastate, and the remaining interstate traffic is transported equally in private carriage and by for-hire trucks. Pulpwood is considered by these persons to be an unmanufactured agricultural commodity, but after it is made into pulp, it admittedly becomes a manufactured product.

The examiner concluded that logs, pulpwood, crude resin, maple sap, bark, leaves, Christmas trees and greenery, coated or uncoated, and Spanish moss are unmanufactured

agricultural commodities. Although, on exceptions, the rail carriers contend that the above-named items are products of the forest and therefore not agricultural commodities, their exceptions in the main are directed to the examiner's classification of pulpwood. At the oral argument, however, they concede that if pulpwood is now ordinarily a "farm crop" it should be regarded as an unmanufactured agricultural commodity, but that "the lumbering interests who are also going to haul logs and who are not engaged in farm operations", should not receive the benefits of the partial exemption.

[fol. 163] The planting and growing of trees particularly those for use as pulpwood is becoming increasingly a farming operation. There is no practical distinction between pulpwood and bolts, poles, piling, fuel wood, and other parts of trees that are felled for the purpose of further manufacture. We conclude that trees which have been felled and those trimmed, cut to length, peeled or split, but not further processed, are unmanufactured agricultural commodities within the meaning of section 203 (b)(6). We agree also with the examiner's conclusions in respect of crude resin, maple sap, bark, leaves, Spanish moss, and greenery.

Nursery Stock, Flowers, and Bulbs

A representative of the American Association of Nurserymen, Inc., composed of 1,176 members in 44 States presented evidence concerning the methods and practices prevalent in the nursery industry. This industry produces fruit trees and small fruit plants, ornamental plants, including shade trees, evergreen and deciduous shrubs, ground covers, etc., and trees and shrub seedlings for reforestation, shelter belts, and other comparable uses. It also engages in the propagation of root crops, such as rhubarb and asparagus. There are several major methods of production, either from the planting of seeds, by grafting or budding, or layering. Illustrative, is the production process of an apple tree. First, the seed is planted, and seedlings are harvested at the end of the first year. The seedlings are then graded according to size and sometimes are shipped to other nurserymen for further growing. The seedlings are thereafter replanted and by the grafting or budding process ap-

ple trees are produced. After they become sufficiently mature, the trees are dug from the soil and either immediately sold for planting in commercial orchards or other places [fol. 164] or they may be stored in barns on the farm. If stored, the trees are graded according to size during the winter months and are sold through regular channels the following spring. Similar production methods are followed with ornamental plants.

During the production process, the plants may be pruned and sheared. Prior to sale the tops and roots are usually pruned in order to remove any weak branches or roots. Fruit trees, berry bushes, strawberry plants, asparagus and rhubarb roots, shade trees and deciduous trees and shrubs, are tied into bundles of various numbers depending upon the grade. In some cases, such as rose bushes, perennial plants, and certain shrubs, the plants are individually packed with peat moss or other moist material about the roots. In the case of evergreens, the plants are dug with a ball of earth about the roots, and wrapped in burlap in order to keep it intact during the course of shipment.

Another item of nursery stock is that of seeding plants produced on nursery farms for use in shelter belts, farm wood lots, reforestation, etc., and for the production of Christmas trees. The forest tree seedlings and shrubs are produced from seeds or cuttings in tremendous quantities and are merchandised as 1, 2, 3, or 4 year old seedlings. Sometimes the seedlings are transplanted from the original seed beds to rows where they are cultivated for 1 or 2 years in addition to a corresponding period in the seed bed. The representative considers that none of the described processes changes the original character of the plant from that of an agricultural commodity.

Evidence pertaining to practices within the florist industry was presented on behalf of the Society of American Florists, which represents 47 associations within the in- [fol. 165] dustry through direct affiliation. Cut flowers valued at 200 million dollars are annually shipped from growers to market in both intrastate and interstate commerce. Most of the shipments move by truck either direct to a market or to a railhead. A substantial number of exempt motor vehicles are used in this transportation.

Flowers are shipped in their natural state, the stems being clipped to remove the flowers from the earth, and the flowers are packaged to prevent injury in shipment. The producers, some of whom are farmers, usually grade the flowers according to quality and size, bunch them, and place them in a corrugated box. Most of the described preparation for market is done by hand. Various types of bulbs, such as gladioli, tulip, and iris bulbs, also move in interstate commerce. These bulbs are packed at the point of production for the most part in wooden crates. They may be repackaged by wholesale and retail distributors. Potted plants are frequently individually wrapped for shipment. Producers usually precool the flowers, potted plants, or bulbs, incident to shipment to the primary market, in order to prolong the life of these items.

The examiner concluded that nursery stock, cut flowers, and bulbs, are unmanufactured agricultural commodities. The rail carriers contend that these articles are not agricultural commodities as they are not generally grown on farms. Certain repliants contend that the term "horticulture," which is recognized as one of the main divisions of agriculture, includes not only the growing of fruits and vegetables, but flowers and ornamental plants as well. They argue that it is illogical to assume that Congress intended to include certain products falling within the category of horticulture, and to exclude others.

[fol. 166] For reasons previously stated, we are unable to conclude that nursery stock, flowers, and bulbs are agricultural commodities within the meaning of section 203 (b)(6).

Miscellaneous Commodities

Considerable honey is produced in Alabama and 95 percent of it is strained on the farm prior to marketing, the remainder is marketed in its natural form in the comb. The record is not clear as to whether any further treatment is accorded strained honey, other than the mere straining.

Sugar cane is produced extensively in Georgia. The cane after harvesting is run through a mill which separates the juice from the cane. The juice is then placed in an evaporator, or boiler and by the application of heat a large portion of the water content is removed, the residue being

a syrup. A further removal or separation of the remaining water produces raw sugar. These processes are said to be necessary in order "to make the cane crop available as a food," and a Georgia representative of the sugar cane industry regards the resulting articles as non-manufactured agricultural commodities because "nothing new has been created and the initial useful value of the cane hasn't been changed".

The examiner made no specific recommendation with respect to the named miscellaneous commodities. We are of the opinion, however, that honey strained or in the comb is an unmanufactured agricultural commodity. In such condition it is in its natural state. The mere harvesting of sugar cane, of course, does not alter its natural state. But the syrup and sugar produced by subsequent processes, are [fol. 167] unquestionably manufactured products since the articles have acquired new forms, qualities, or properties. We are also of the opinion that sugar beets in their natural state are an unmanufactured agricultural commodity.

Cases in Conflict Overruled

With the exception of the *Harwood* case, we did not reopen any of the numerous proceedings in which a determination has heretofore been made in respect of certain commodities falling within or without the partial exemption. The findings in certain previous reports conflict with our findings herein. In order to remove any doubt in the matter, to the extent that the findings in such previous reports differ from those herein, they are hereby overruled.

[fol. 168] Requests for Further Hearing

Interstate Common Carrier Council of Maryland, Inc., requests a further hearing in the investigation proceeding (a) to develop more fully the industrial practices existing in respect of the processing of poultry and "peanut products" and (b) "to receive" evidence concerning the "effects of the within proceedings on the National Transportation Policy." It fails to state what evidence, if any would be adduced at a further hearing. Service Trucking Company, Inc., also requests further hearing for the purpose of submitting additional evidence relative to market-

ing practices in the poultry industry. It claims to have been without "actual notice" that poultry was to be included in the investigation proceeding, despite its apparent familiarity with the second report in the *Monark Egg* case, in which division 3 stated that poultry is included within the description agricultural commodities. Although this carrier describes at some length the evidence which would be adduced if a further hearing is held, such evidence would not materially add to that now of record and would not affect our findings herein. Accordingly, the requests for further hearing are denied. Motor Carriers Traffic Association also requested a further hearing in the investigation proceeding for the purpose of submitting additional evidence relative to redried leaf tobacco. In view of our conclusions herein, the association's request for further hearing is also denied.

No. MC-107669

There remains for consideration, the application in No. MC-107669 (the *Harwood* case). As stated in the prior report in that proceeding, the need there found to be existing for Harwood's proposed service was for the transporta- [fol. 169] tion of fresh fruits and vegetables and processed fresh vegetables (including those chopped up), from and to described points and areas. In view of our conclusions herein that chopped-up vegetables do not come within the partial exemption, a permit is required at least with respect to that portion of the operation proposed. As previously stated, however, neither applicant nor anyone in his behalf appeared at the further hearing in the Harwood proceeding. In the circumstances, it appears that applicant, Norman E. Harwood, is no longer interested in his application. Accordingly, we shall deny the application.

Findings

In No. MC-C-988, we find that the term "agricultural commodities (not including manufactured products thereof)" as used in section 203 (b)(6) of the Interstate Commerce Act means: Products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live

poultry, and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment, have been so changed as to possess new forms, qualities, or properties, or result in combinations.

We find that the term "agricultural commodities (not including manufactured products thereof)" as used in section 203 (b)(6) includes: (1) fruits, berries, and vegetables which remain in their natural state, including those packaged in bags or other containers, but excluding those placed in hermetically sealed containers, those frozen or quick frozen, and those shelled, sliced, shredded, or chopped up; (2) fruits, berries, and vegetables dried naturally or artificially; (3) seeds, including inoculated seeds, but not seeds [fol. 170] prepared for condiment use or those which have been deawned, scarified or otherwise treated for seeding purposes; (4) forage, hay, straw, corn and sorghum fodder, corn cobs, and stover; (5) (a) hops and castor beans, and (b) leaf tobacco, but excluding redried tobacco leaf; (6) raw peanuts, and other nuts, unshelled; (7) whole grains, namely, wheat, rye, corn, rice, oats, barley and sorghum grain, not including dehulled rice and oats, or pearled barley; (8) (a) cotton in bales or in the seed, (b) cottonseed and flaxseed, and (c) ramie fiber, flax fiber, and hemp fiber; (9) live poultry, namely, chickens, turkeys, ducks, geese, and guineas; (10) milk, cream, and skim milk, including that which has been pasteurized, standardized milk, homogenized milk and cream, vitamin "D" milk, and vitamin "D" skim milk; (11) wool and mohair, excluding cleaned and scoured wool and mohair; (12) eggs, including oiled eggs, but excluding: whole or shelled eggs, frozen or dried eggs, frozen or dried egg yolks, and frozen or dried egg albumin; (13) (a) trees which have been felled and those trimmed, cut to length, peeled or split, but not further processed, and (b) crude resin, maple sap, bark, leaves, Spanish moss, and greenery; (14) sugar cane, sugar beets, honey in the comb, and strained honey.

In No. MC-107669, on further hearing, we find that applicant has failed to establish that he is willing and able to conduct the proposed operation; and that the application should be denied.

There are differences of opinion among the members of the Commission with respect to whether certain of the commodities named in the findings in the title proceeding are agricultural commodities within the meaning of section 203 (b)(6) of the act, but to the extent that the commodities named therein are found to fall within the exemption the finding with respect to each commodity or group of commodities has the approval of a majority of the Commission although not the same majority in all instances.

[fol. 171] An appropriate order will be entered discontinuing the proceeding No. MC-C-968, and denying the application in No. MC-107669.

LEE, Commissioner, concurring in part:

On the whole I think this is a sound report. It has my approval to the full extent to which it finds that commodities named therein fall within the partial exemption provided in section 203 (b)(6) of the act. I find it necessary separately to state my views because of the findings, with which I am unable to agree, that certain agricultural commodities do not fall within that exemption after having been subjected to commonly followed forms of processing. I believe these findings improperly narrow the scope of the exemption contrary to the intention of Congress.

Senate Bill 1629, which as enacted, and later amended, is now Part II of the Interstate Commerce Act, as reported to the House of Representatives provided for the partial exemption of motor vehicles used exclusively in carrying "unprocessed agricultural products." After considerable debate on the floor of the House as to the meaning of the quoted words the subcommittee in charge of the bill proposed an amendment which replaced them with the words "agricultural commodities (not including manufactured products thereof)", the proper interpretation and application of which we are here considering. In explanation of this amendment the Chairman of the subcommitee stated:

Mr. Chairman, we have heard a good deal of discussion this afternoon as to what is a processed agricultural product, whether that would include *pasteurized milk* or *ginned cotton*. It was not the intent of the Committee that it should include those products. Therefore, to meet the views of

many Members we thought we would strike out the word "unprocessed" and make it apply only to *manufactured products*. (Emphasis supplied.)

The amended provision was adopted by the House and thereafter it and other House amendments were concurred in by the Senate after the Chairman of the Senate Committee explained that the House amendments generally liberalized the provisions of the bill.

The words "not including manufactured products thereof" were carefully chosen by the House subcommittee, as indicated by the Chairman's statement, to draw the line between products which are manufactured from agricultural commodities and which should not be exempt, on the one hand, and, on the other, agricultural commodities which have been subjected to processing which does not change them into manufactured products and which should fall within the exemption. The specific reference in the Chairman's statement to pasteurized milk and ginned cotton indicates quite clearly, I think, that the words "manufactured products thereof" do not mean agricultural commodities which have been subjected to such processing as pasteurizing, or ginning, or shelling, or slicing, or shredding, or chopping, or freezing, or drying, or dressing, or cleaning, or scouring, and which after such processing still retain the names, characteristics, or uses which they previously had. It appears that the House, in adopting the subcommittee's amendment, and the Senate, in concurring in that amendment, intended that the distinction between any particular "agricultural commodity", falling within the exemption, and "manufactured products, thereof", excluded from the exemption, is not to be based upon whether such "agricultural commodity" has been subjected to processing, such as the simple processing of shelling an egg or [fol. 172] even the elaborate processing of pasteurizing milk with the relatively complex and costly equipment of a modern, big-city dairy, but is to be based upon whether, as the result of processing, such "agricultural commodity" has been so changed that a new and distinctive commodity or article is produced. To give recognition to this intention of the Congress in interpreting the words "manufactured products thereof" will accord to them their usual

and popular meaning which, even in the absence of supporting legislative history, should here by attributed to them.

The decisions of the United States Supreme Court dealing with the meaning of the word "manufactured" strongly support the view that commonly followed forms of processing do not change agricultural commodities into manufactured products. In Hartranft v. Weigmann, 121 U. S. 609, shells imported from abroad had been subjected to a duty thereon under a tariff imposing a 35 percent ad valorem tax on manufactured of shells. The shells were sold for ornaments except that some were sold to be made into buttons, handles to penknives, et cetera. The outer layer had been cleaned from the shell by acid, the second layer was ground off with an emery wheel, and some of the shells were etched by acids so as to produce inscriptions on them. Unmanufactured shells were exempted from the duty, and the importer sought to recover the amount exacted of him. In rendering judgment for the importer the court said:

> We are of the opinion that the shells in question were not manufactured and were not manufactures of shells, within the sense of the statute imposing a duty of 35 per centum upon such manufacturers, but were shells not manufactured, and fell under that designation in the free list. They were still shells. They had not been manufactured into a new and different article having a distinctive name, character or use from that of a shell. The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws.

This decision was cited and followed by the same Court in another tariff case, Anheuser-Busch Assn. v. United States, 207 U. S. 356, wherein it was held that the treatment of corks by a manufacturer and exporter of beer, by way of sterilizing them and closing the seams, holes, and crevices by a chemical bath and coating process, so as to adapt them for export use, did not entitle the manufacturer to the drawback allowed in the tariff act on imported raw material used in the manufacture of articles in this country. The Court said:

> Manufacture implies change, but every change is not

manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary, as set forth and illustrated in Hartranft v. Weigmann, 121 U. S. 609. There must be transformation; a new and different article must emerge, "having a distinctive name, character or use." This cannot be said of the corks in question. A cork put through the claimant's process is still a cork.

[fol. 173] In a more recent case, Fruit Growers, Inc. v. Brogdex Co., 283 U. S. 1, the court considered whether the impregnation with borax of the rind of an orange, through immersion in a solution which rendered the orange resistant to blue mold decay, constituted manufacturing and resulted in a manufactured article within the meaning of the laws relating to patents. In holding that oranges so treated are not manufactured articles the court said:

> "Manufacture", as well defined by the Century Dictionary, is "the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery". Also "anything made for use from raw or prepared materials."
>
> Addition of borax to the rind of natural fruit does not produce from the raw materials an article for use which possesses a new or distinctive form, quality, or property. The added substance only protects the natural article against deterioration by inhibiting development of extraneous spores upon the rind. There is no change in the name, appearance, or general character of the fruit. It remains a fresh orange fit only for the same beneficial uses as theretofore.

Thus, in considering the tariff and patent laws the Supreme Court has held that manufacture implies change, that there must be transformation, that a new and different article must emerge and that if there is no transformation into a new and different article, having a distinctive, name, character, or use, of the commodity or article which has been subjected to the application of labor, either by hand or by mechanism, or to treatment, labor or manipulation, it is still the same commodity or article and not a manufactured

product thereof. No sound reason appears for reaching a different result in the interpretation of the Interstate Commerce Act.

After some commonly followed processing the commodities to which I have reference are not new and different articles. On the contrary, each remains the same agricultural commodity, retaining its well-known name and its general characteristics and uses. The slicing of a carrot or the shelling of an egg or of a peanut does not change it into a new and distinctive article. Nor does the deawning and scarifying of alfalfa seed, or the redrying of tobacco leaf, or the cleaning and scouring of wool change them into new and distinctive articles. After such slicing, shelling, deawning, scarifying, redrying, cleaning or scouring there still remains what is known as a carrot, an egg, a peanut, alfalfa seed, tobacco leaf and wool. Each retains its former characteristics and uses.

As I have heretofore pointed out in other proceedings, it may be that in the preparation for freezing some fruits, berries or vegetables are so changed in character and appearance as to warrant the conclusion that they are in fact manufactured products. However, after freezing or quick-freezing most fruits, berries, and vegetables retain their inherent characteristics and appearances and are suitable only for the same uses as before undergoing such freezing.

Chickens, turkeys, ducks, geese and guineas alive and after having been killed are still known by the same names. The dressing and cutting into pieces of a chicken or a turkey [fol. 174] does not result in the production of a distinctive article having any new characteristics or uses. It still is an agricultural commodity. Surely the Thanksgiving turkey which the farmer's wife so carefully stuffs and places in the oven is not a manufactured article.

It is my considered opinion that the following are agricultural commodities and as such fall within the partial exemption provided in section 203 (b)(6):

> Fruits, berries and vegetables which have been shelled, sliced, shredded, chopped up, or frozen or quick frozen, with the possible exception of those which in their frozen state are substantially changed in character and appearance.

Seeds which have been deawned, scarified, or otherwise treated for seeding purposes.

Redried tobacco leaf.

Shelled raw peanuts and other shelled raw nuts.

Dressed and cut-up chickens, turkeys, ducks, geese and guineas.

Cleaned and scoured wool and mohair.

Shelled and frozen eggs.

Commissioner Patterson concurs in the result.

ROGERS, Commissioner, dissenting:

The findings of the majority name certain commodities which are considered to be included in the definition "agricultural commodities (not including manufactured products therof)" within the meaning of section 203 (b)(6) of the Interstate Commerce Act. This decision places motor vehicles used in carrying the specified commodities within the partial exemption of that subsection and has the effect of enabling any person, including the professional truckman, to transport these commodities in interstate or foreign commerce, free from all regulatory provisions of the act, except the safety provisions of section 204. I am opposed to any construction of this subsection which in effect results in extending the exemption to any one who wished to enter the motor carrier field. That is not, in my opinion, a correct interpretation of the law.

The exemption in question should be administered in keeping with the principle in *I. C. C. v. Service Trucking Co., Inc.*, 186 Fed. (2d) 400. With this in mind, the majority view would enable a carrier holding a certificate authorizing the transportation of commodities not within the purview of section 203 (b)(6) to transport the named commodities for anybody, anywhere, so long as the two groups of commodities are not transported for compensation in the same vehicle at the same time. It would allow anyone to [fol. 175] become a professional truckman without proving a public need for the service. Such a carrier could for example, transport imported bananas from shipside at Port Everglades, Fla., to a market in New York City, which would be without benefit to our farmers. Congress did not, in my opinion, intend such a result. The legislative history

of the exemption shows clearly that Congress only intended to extend a benefit to the farmer by relieving him from the complex regulation provided for the professional truckman. The majority agrees with this in theory, but has extended the benefit of the exemption way beyond the farmer. Congress was concerned only with the farmer. Senator Wheeler indicated this when he said:

> "In other words, any farmer who engages in casual trucking operations, say from his farm to Des Moines, Iowa, for the purpose of carrying his products and his neighbor's products, is within the exemption."

And on the House side, Representative Wadsworth used language indicating that the "professional truckman" should not be benefited by the exemption as follows:

> "But the truckman to whom I refer is a professional truckman. He is not casual at all. He lives in the village and takes orders to carry goods in any direction he feels able to carry them and at a price he thinks is fair."

I am strongly of the belief that Congress intended to relieve from the regulatory provisions of the Act, except the safety provisions of section 204, the transportation of any farm commodity *from the farm to the point where the commodity first enters the ordinary channels of commerce*, while it is being transported either by the farmer himself or by someone on behalf of the farmer. The court in *I. C. C. v. Weldon*, 90 Fed. Supp. 873, affirmed United States Court of Appeals, Sixth Circuit, No. 11,247, decided April 9, 1951, following the channel of commerce theory, very aptly stated:

> "Under the facts here the producer, or farmer, parts with all of his right, title and interest in the peanuts produced by him on delivery and sale to the shelling plant. There must be a time when peanuts cease to be the products of the farm and are considered manufactured articles, and it seems appropriate in dealing with the question here involved to say that peanuts are a manufactured product from the time same are sold by the farmer and delivered at the shelling plant."

The mere naming of a group of commodities which might reasonably be classed as "unmanufactured" agricultural products and allowing the certificated carrier whose operating authority does not include the right to move such commodities or the no less professional carrier who proposes to handle them exclusively, to transport the named commodities, confers no constructive benefit upon the farmer. It will, however, adversely affect rail carriers and certificated motor carriers holding authority to transport these commodities inasmuch as they will be at a decided disadvantage in competing with carriers obliged to comply only [fol. 176] with the safety provisions of section 204. The decision of the majority, therefore, is not only contrary to the legislative intent, but is not conducive to practical regulation and sound economic conditions in the transportation industry.

I am authorized to state that Commissioner Cross concurs in this expression.

Commissioner Johnson dissents.

Commissioner Mitchell was necessarily absent and did not participate in the disposition of these proceedings.

Commissioner Knudson did not participate in the disposition of these proceedings.

[fol. 177] Appendix

List of commodities held exempt of non-exempt by the Commission, division 5, of by the Bureau of Motor Carriers under section 203 (b)(6) of the Interstate Commerce Act.

I. *Agricultural commodities held to be within the exemption:*

(a) By the Commission, Division 5:

Raw milk—Derr Contract Carrier Application, 43 M.C.C. 437.

Cream, skim milk, standardized milk—Severson Common Carrier Application, 46 M.C.C. 6.

Mushrooms, fresh—Dougherty Common Carrier Application, 31 M.C.C. 793.

Apples, fresh, merely packed, not processed—Newman Contract Carrier Application, 44 M.C.C. 190.

Peanuts, unshelled—Monark Egg Corp., Contract Carrier Application, 44 M.C.C. 15.

Wool and mohair, in natural state—Aryan Everett Bates Extension—Texas, 48 M.C.C. 818.

(b) By the Bureau of Motor Carriers:

Broom corn.

Coffee (beans) green.

Cotton, ginned.

Cotton seed.

Eggs—bathed with hot oil which closes pores to aid in preservation.

Fruits and vegetables.

Beans, dried naturally.

Citrus fruit, artifically treated by ethylene gas or other methods to increase color or to protect from mold.

Fruit, dried naturally, even if bathed in a preservative solution before being transported.

Fresh fruits and berries, including imported graded, brushed or dusted with sulphur (opinion involved peaches); packed in sawdust (opinion involved grapes).

Shelled peas—where pea vines are cut and immediately put through a peavining machine which picks the pods from the vine and separates the peas from the pods.

Hay, loose or baled.

Honey, in natural state.

Nuts, Brazil, unshelled, imported (washed and bleached).

Peanuts, cleaned and graded by machines, but still in shell.

Plants, cabbage and tomato.

Seed corn hybrid.

Seed potatoes which receive no special handling or attention.

[fol. 178] Straw, loose or baled.

Wheat, threshed.

Wool, in natural state.

11. *Commodities held to be manufactured products, and hence not within the exemption:*

(a) By the Commission, Division 5:

Cottage cheese and cream cheese—Pohl Contract Carrier Application, 1 M.C.C. 707.[1]

Clean rice, rice bran, rice polish—Dugan Contract Carrier Application, 7 M.C.C. 15.[1]

Pasteurized milk—Luckey Common Carrier Application, 12 M.C.C. 739.[1]

Fresh cut-up vegetables in cellophane bags and fresh vegetables, washed, cleaned, and packaged in cellophane bags or boxes—Harwood Contract Carrier Application, 47 M.C.C. 597.

Fruits and vegetables, quick-frozen—Newton Extension of Operations—Frozen foods, 43 M.C.C. 787.

Peanuts, shelled—Monark Egg Corp. Contract Carrier Application, 44 M.C.C. 15.

Peanut shells, ground—Harris and Callis Contract Carrier Application, 44 M.C.C. 169.

Poultry, killed and picked, though not drawn—Monark Egg Contract Carrier Application, 44 M.C.C. 15.

Leaf tobacco, redried—Yeary Transfer Company, Inc., Extension—Special Commodities, 49 M.C.C. 808; and W. C. Taylor Common Carrier Application, No. MC-110299, decided December 2, 1949.

(b) By the Bureau of Motor Carriers:

Barley, rolled.

Butter.

Coffee, ground or roasted.

Cottonseed meal and hulls.

Beans, packaged, dried artifically or packed in small containers for retail trade.

Fruits and vegetables, canned.

[fol. 179] Dried fruits, dried mechanically or artificially.

[1] Report and recommended order of joint board became effective as order of the Commission by operation of the law.

Peaches, peeled, pitted, etc., and placed in cold storage in unsealed containers.

Strawberries, capped, in syrup, in unsealed containers and placed in cold storage.

Cucumbers, packed in salt water as a preservative.

Honey, heated and bottled to prevent or retard granulation.

Milk, condensed; skim; powdered; buttermilk; vitamin D; Pasteurized.

Feathers.

Rice, cleaned or coated.

Tobacco, dried and with stems pulled and leaf chopped up.

III. *Commodities held by the Bureau of Motor Carriers not to be agricultural commodities and hence not within the exemption:*

Coal.

Flowers or ornamental plants.

Gladiolus bulbs.

Grass sod.

Gravel.

Hides, green (salted or unsalted).

Logs.

Mushroom spawn.

Naval stores, such as pitch, turpentine and other resinous products.

Rock.

Sand.

Shrubs, cut flowers and other nursery stock.

Seeds, which have received special attention and handling for marketing such as those prepared by seed houses and placed in packages for distribution by merchants.

Soil, top.

Spaghnum moss.

Trees, including Christmas trees.

[fol. 180] ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of April, A.D. 1951.

No. MC-C-968

Determination of Exempted Agricultural Commodities

No. MC-107669

Norman E. Harwood Contract Carrier Application

It appearing, That by order entered in No. MC-C-968, the Commission, on its own motion, instituted an investigation into and concerning the meaning of the words "agricultural commodities (not including manufactured products thereof)" as used in section 203 (b)(6) of the Interstate Commerce Act;

It further appearing, That on December 16, 1947, the Commission, division 5, entered its report, 47 M.C.C. 597, and order in No. MC-107669 granting applicant, Norman E. Harwood, a permit authorizing certain operations, in interstate or foreign commerce, as a contract carrier by motor vehicle, and otherwise denying the application;

It further appearing, That upon consideration of petitions filed by the Secretary of Agriculture and the Atlantic Commission Co., Inc.; and others, the Commission reopened the proceeding in No. MC-107669 for further hearing on a consolidated record with No. MC-C-968;

And it further appearing, That full investigation of the matters and things involved has been made, and that the Commission, on the date hereof, has made and filed its report on oral argument herein containing its findings of [fol. 181] fact and conclusions thereon, which report and the report and order of December 16, 1947, in No. MC-107669, are hereby referred to and made a part hereof:

It is ordered, That the proceeding in No. MC-C-968 be, and it is hereby discontinued.

It is further ordered, That the order of December 16, 1947, in No. MC-107669, be, and it is hereby, vacated and set aside.

And it is further ordered, That the application in No. MC-107669, be, and it is hereby, denied.

By the Commission.

W. P. Bartel, Secretary.

(Seal)

[fol. 182] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION TO COMPLAINT OF THE SECRETARY OF AGRICULTURE—Filed, August 30, 1954

Now comes the defendant Interstate Commerce Commission, hereinafter referred to as the Commission, and for answer to the complaint herein filed by Ezra Taft Benson, Secretary of Agriculture of the United States, as an intervening plaintiff, admits, denies, and avers as follows:

1

The Commission admits the allegations in paragraphs I, II, III, and IV of the said complaint.

2

The Commission admits the allegations in paragraph V, except the allegation that the Commission in the said proceeding found and concluded that inoculated seeds are not "agricultural commodities" within the meaning of Section [fol. 183] 203(b)(6) of the said Act; and avers that it found and concluded therein that inoculated seeds are agricultural commodities within the meaning of the said section.

3

The Commission denies each of and all the allegations in paragraph VI.

4

Further answering the said complaint, the Commission alleges that the findings in its said report and order were

and are, and each of them was and is, fully supported by the evidence admitted in the said proceeding; that the said findings afford an adequate basis for the Commission's conclusions therein; and that in making and entering the said report and order the Commission considered and weighed car-fully, in the light of its own knowledge and experience, each fact, circumstance, and condition brought to its attention by or on behalf of the parties to the said proceeding.

The Commission further alleges that the said report and order were not made or entered either arbitrarily or unjustly, or without proof, or contrary to the relevant evidence, or without evidence to support them; that in making its said report and order the Commission did not exceed the authority conferred upon it by law; and the Commission denies each of and all the allegations to the contrary contained in the said complaint, and denies that its said report and order are invalid or illegal for any of the reasons set forth in the said complaint, or for any other reason.

Wherefore, having fully answered, the Commission prays that the relief sought by the Secretary of Agriculture, as [fol. 184] intervening plaintiff, be denied and that the said complaint be dismissed.

(S.) Leo H. Pou, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

(S.) Edward M. Reidy, General Counsel, of Counsel.

[fols. 185-220] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 221] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 8285 and Civil Action No. 8396

FROZEN FOOD EXPRESS, Plaintiff; EZRA TAFT BENSON, Secretary of Agriculture of the United States, Intervening Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants; Common Carrier Irregular Route Conference of American Trucking Association, et al.

OPINION OF THREE-JUDGE COURT—January 26, 1955

Before Hutcheson, Chief Circuit Judge, and Connally and Kennerly, District Judges

CONNALLY, District Judge:

Filed pursuant to Secs. 1336, 1398, and 2321-2325, of Title 28; to Sec. 1009, of Title 5; and to Sec. 305(g), of Title 49, U.S.C.A., each of the foregoing civil actions attacks and seeks to restrain enforcement of an order of the Interstate Commerce Commission. Presenting the same [fol. 222] question of law, and substantial identity of parties, the actions were consolidated for hearing and trial. The question for determination is whether a number of different commodities, as later noted herein, all of which have their origin on the farm or ranch, fall within the scope of the so-called agricultural exemption (Sec. 303(b)(6)) of Part II of the Interstate Commerce Act (Title 49, U.S.C.A., Sec. 301, et seq.): By terms of the last-mentioned statute, motor vehicles used in carrying property consisting of "ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)", are exempt from Interstate Commerce Commission control (save for minor exceptions not here pertinent). The plaintiff in each of the consolidated actions, being a trucking concern holding a certificate of convenience and necessity from the Commission, desires to carry some or all of the com-

modities in question, unrestricted by the terms of its own certificate, or by other Commission regulation. Hence the plaintiff, supported to a considerable extent in this contention by the Secretary of Agriculture of the United States, urges upon the Court a broad interpretation of the statutory language "agricultural commodities (not including manufactured products thereof)", which would have the net result of enlarging this so-called agricultural exemption. The Commission, on the other hand, and those intervenors who align themselves with the Commission, urge upon us that most of the commodities in question, [fol. 223] by virtue of the treatment and processing which they receive, either have lost their identity as "agricultural commodities", or have become "manufactured products thereof". The result of this argument is drastically to restrict the scope of the exemption.

Civil Action 8285:

In June, 1948, the Interstate Commerce Commission, of its own motion, instituted a proceeding, being MC-C-968 on its docket, in the nature of an investigation, to determine the meaning and scope of the term "agricultural commodities (not including manufactured products thereof)", as used in the above-mentioned statute. The proceeding was widely noticed in the affected trades and industries. Many interested parties, including the Secretary of Agriculture of the United States, the Commissioners of Agriculture from a number of the States, associations of shippers, motor carriers, and others, intervened. After extended hearings, during which much expert testimony was offered as to the manner and method of cleaning, preparing, packaging, and otherwise processing the various commodities in question, the Commission issued its report and order entitled "Determination of Exempted Agricultural Commodities" (52 I.C.C. Reports, Motor Carrier Cases, 511-566). In such report, the Commission announced its definition of such statutory term,[1] which definition it then

[1] "In No. MC-C-968, we find that the term 'agricultural commodities (not including manufactured products thereof)' as used in section 203(b)(6) of the Interstate

[fol. 224] undertook to apply to the various commodities under consideration, and enumerated those which it found to come within the statutory language, and those which it found to fall without.[2] Thereupon, the proceeding was terminated and removed from the Commission docket.

Commerce Act means: Products raised or purchased on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment, have been so changed as to possess new forms, qualities, or properties, or result in combinations."

[2] "We find that the term 'agricultural commodities (not including manufactured products thereof)' as used in section 203(b)(6) includes: (1) fruits, berries, and vegetables which remain in their natural state, including those packaged in bags or other containers, but excluding those placed in hermetically sealed containers, those frozen or quick frozen, and those shelled, sliced, shredded, or chopped up; (2) fruits, berries, and vegetables dried naturally or artificially; (3) seeds, including inoculated seeds, but not seeds prepared for condiment use or those which have been deawned, scarified or otherwise treated for seeding purposes; (4) forage, hay, straw, corn and sorghum fodder, corn cobs, and stover; (5) (a) hops and castor beans, and (b) leaf tobacco, but excluding redried tobacco leaf; (6) raw peanuts, and other nuts, unshelled; (7) whole grains, namely, wheat, rye, corn, rice, oats; barley and sorghum grain, not including dehulled rice and oats, or pearled barley; (8) (a) cotton in bales or in the seed, (b) cottonseed and flaxseed, and (c) ramie fiber, flax fiber, and hemp fiber; (9) live poultry, namely, chickens, turkeys, ducks, geese, and guineas; (10) milk, cream, and skim milk, including that which has been pasteurized, standardized milk, homogenized milk and cream, vitamin 'D' milk, and vitamin 'D' skim milk; (11) wool and mohair, excluding cleaned and scoured wool and mohair; (12) eggs, including oiled eggs, but excluding whole or shelled eggs, frozen or dried eggs,

[fol. 225] The plaintiff Frozen Food Express was not a party to the proceeding before the Commission. By amended complaint filed here July 12, 1954, plaintiff alleges that it desires to carry agricultural commodities (not including manufactured products thereof) for hire, to and from all points within the United States, irrespective of the limitations imposed by its own certificate; that the report of April 13, 1951, deprives plaintiff of its right to do so. Alleging that the action of the Commission, in entering the report in question, was arbitrary, capricious and unreasonable, that it constituted an abuse of discretion and a violation of the Commission's statutory powers, the plaintiff here seeks an injunction to restrain the Commission and the United States from enforcing or recognizing the validity of such report; restraining interference with the plaintiff's proposed transportation of such agricultural commodities (not including manufactured products thereof), and seeks an order of this Court declaring the report of the Commission of April 13, 1951, to be null and void.

The Secretary of Agriculture has intervened, denominating himself "Intervening Plaintiff". He makes common [fol. 226] cause with plaintiff in contending that a number of commodities [3] are within the exemption. Several trucking associations; and some sixty southern and western railroad companies, have intervened. These interveners take

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frozen or dried egg yolks, and frozen or dried egg albumin; (13) (a) trees which have been felled and those trimmed, cut to length, peeled or split, but not further processed, and (b) crude resin, maple sap, bark, leaves, Spanish moss, and greenery; (14) sugar cane, sugar beets, honey in the comb, and strained honey."

[3] "(1) Slaughtered meat animals and fresh meats;
(2) Dressed and cut-up poultry, fresh or frozen;
(3) Feathers;
(4) Raw shelled peanuts and raw shelled nuts;
(5) Hay chopped up fine;
(6) Cotton linters and cottonseed hulls;
(7) Frozen cream, frozen skim milk, and frozen milk;
(8) Seeds which have been deawned, scarified, or innoculated."

a contrary view, and support the report of the Interstate Commerce Commission.

We are of the opinion that the action may not be maintained, and must be dismissed, for the reason that the report and order of the Interstate Commerce Commission of April 13, 1951, is not an "order" subject to judicial review under any of the statutes cited. The proceeding before the Commission was not an adversary one. The order which initiated it purported to do no more than direct that an investigation be made of the meaning of the statutory language. Notice was given only to the public. When the final report and order was forthcoming some two years later, the only "order" entered was one discontinuing the proceeding and removing it from the Commission's docket. The question is controlled by *U. S. v. Los Angeles R. R. Co.* (273 U. S. 284), holding a very similar "order" of the Interstate Commerce Commission which found, after an investigation, the value of certain railroad properties, not to be subject to review. The language of Mr. Justice Brandeis, speaking [fol. 227] for a unanimous Court there, aptly describes the order in issue here:

> "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation."

The proponents of jurisdiction here rely upon *Columbia Broadcasting System v. U. S.* (316 U. S. 407). It was there held that an order of the Federal Communications Commission promulgating certain rules and regulations requiring that the Commission deny a license to broadcasting stations under certain circumstances, was subject to judicial review,

upon a showing by the complaining party of strong equitable considerations. This authority is clearly distinguishable from the present case. The order there in question was entered in the exercise of the agency's rule-making power. Such orders, together with those fixing rates and those determining controversies before the administrative body, have long been recognized as subject to review (*U. S. v. Los Angeles R. R. Co., supra*).

Likewise, the complaining party there showed an immediate and continuing threat of irreparable injury if the order were not reviewed. It is not so here. The statement of plaintiff that it dsires to carry for hire most or all of the [fol. 228] commodities on the Commission's proscribed list, and that if it does so, the Commission likely will seek injunctive relief to restrain plaintiff, shows no basis for the intervention of a court of equity. Plaintiff will have an adequate remedy in the event of such interference.

It follows that Civil Action 8285 will be dismissed.

Civil Action 8396:

A complaint was filed December 23, 1953, with the Interstate Commerce Commission by East Texas Motor Freight Lines, Gillette Motor Transport, Inc., and Jones Truck Lines, Inc., charging that Frozen Food Express was and had been engaged in transporting fresh and frozen dressed poultry, and fresh and frozen meats, and meat products, for hire, between points in interstate commerce not authorized by its certificate of convenience and necessity. Frozen Food readily admitted that it had been so engaged, but defended on the theory that such products all were within the agricultural exemption. The Commission found each of these products not to be within the exemption, and ordered Frozen Food Express to cease and desist from such unauthorized transportation. The present proceeding was filed by Frozen Food Express to review that order.[5]

While the present action was pending in this Court, the [fol. 229] Secretary of Agriculture of the United States filed

[5] Plaintiff has abandoned the contention that meat products are within the agricultural exemption, and this commodity will not be further considered here.

with the Commission his petition for leave to intervene, pursuant to Sec. 1291, of Title 7, U. S. C. A. This request was denied; and the Secretary appears here as "Intervening Plaintiff", contending (1) that the proceedings before the Commission were null and void by reason of the failure of the Commission to notify him of the pendency thereof (Sec. 1291(a), of Title 7, U. S. C. A.); (2) that the proceedings should be remanded to the Commission by reason of its error of law in having denied him leave to intervene; and (3) that the cease and desist order should be enjoined by reason of the alleged error of the Commission in holding fresh and frozen meats, and fresh and frozen dressed poultry, to be beyond the limits of the agricultural exemption.

The rail carriers and trucking associations which intervened in Civil Action 8285, also appear in this action. They support the Commission, and oppose the position taken by the plaintiff and the Secretary of Agriculture.

Armour & Company, being engaged at various points in the United States in the slaughter of livestock and the killing, dressing, and sale of poultry, has intervened, urging that dressed poultry is an exempt commodity, that meat is not.

The position taken by the Secretary of Agriculture that the proceeding before the Commission was null and void in its entirety by reason of the failure of the Commission to give him notice thereof, need not long detain us. The proceeding there was not one with respect to "rates, charges, [fol. 230] tariffs, and practices" relating to the transportation of farm products, and hence was not one of which the Secretary was entitled to notice under the statute (Secs. 1291 and 1622, of Title 7, U. S. C. A.). *U. S. v. Pa. R. R. Co.* (242 U. S. 208); *B. & O. R. R. Co. v. U. S.* (277 U. S. 292); *Mo. Pac. R. R. Co. v. Norwood* (283 U. S. 249). The Commission likewise did not commit an error of law in denying the Secretary's Petition of Intervention, filed there while the present proceeding was pending here.

Most able and exhaustive treatment is given the question now before us, in so far as it concerns dressed poultry, by Judge Graven of the United States District Court for the Northern District of Iowa, in *I. C. C. v. Kroblin* (113 F. Supp. 599, aff. 242 F. 2d 555, cert. den. Oct. 14, 1954). Re-

viewing the long struggle between the Interstate Commerce Commission in its efforts to restrict the application of the exemption in question, and the Department of Agriculture and others in seeking to expand it; reviewing the legislative history of the Motor Carrier Act of 1935, and various proposed amendments thereto; and considering the congressional intent which prompted the insertion of the agricultural exemption, Judge Graven concluded that dressed poultry constituted an "agricultural commodity", and did not constitute a "manufactured product thereof". Hence, such commodity was within the exemption. It is sufficient to state that we agree with those conclusions as to fresh and frozen dressed poultry.

Counsel for the Commission urges that this Court should [fol. 231] disregard the *Krahlin* case, on the argument that the only question before us is one of the adequacy of the evidence before the Commission. It is said that the order which was entered was one within the general purview of the Commission's authority, and that if its findings are supported by "substantial evidence", this Court has no alternative but to leave it undisturbed. While we do not quarrel with such statement as a general proposition of law, the argument is not convincing in its application to the present record. The primary facts before the Commission were without dispute and were the subject of stipulation. Reduced to simplest form, they showed that before a chicken or duck became "dressed poultry": the bird was killed, his feathers and entrails removed, he was chilled, and in some cases frozen, packaged, etc. In addition, such "facts" consisted of evidence of so-called "expert" nature, that this treatment or processing of the chicken or duck rendered him a "manufactured product".

It is apparent that there is only one ultimate finding called for, namely, whether under the type of processing reflected by the record, the product falls within the statutory definition. The question then is a mixed one of law and fact, calling for the application of the processes of legal reasoning and of principles of statutory construction. The fact that the Commission's findings are supported by an "expert" who gives his opinion that a dressed chicken is a manufactured product, does not foreclose the question,

[fol. 232] nor remove it from the scope of judicial review. *Baumgartner v. U. S.* (322 U. S. 665); *Lehmann v. Acheson* (206 F. 2d 592, 30); *Galena Oaks Corp. v. Scofield*, (— F. 2d —, 50; Dec. 29, 1954, as yet unreported).

In our opinion, fresh and frozen meat does not fall within the category either of "ordinary livestock" or of "agricultural commodities", and hence is not within the exemption. Since the enactment of Part II of the Interstate Commerce Act in 1935, motor vehicles used exclusively in carrying "livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof)", have been exempt. By amendment in 1940, the term "ordinary" was inserted immediately before the word "livestock". The term "ordinary livestock" is defined in Sec. 20(11) of the Act as "all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses".

Referring only to the live animals, "ordinary livestock" may not be tortured to include the carcasses of slaughtered meat animals, or the meat which is the product of butchering. Meat has been regarded generally in the industry as a controlled commodity for some twenty years. Congress has dealt with the agricultural exemption on many occasions. Considering the ease with which the Congress might have added appropriate language to evidence its intent to exempt fresh or frozen meat from Interstate Commerce Commission control, if it so desired, the absence of such language indicates that no such intent was entertained.

[fol. 233] Nor may meat, fresh or frozen, be considered an "agricultural commodity" for present purposes. The exception has treated the live meat animal in a separate generic class from "agricultural commodity" since the enactment of the statute; and if the live animal, on entering the slaughter pen or the packing house, is not an "agricultural commodity", we are unable to see how he becomes one on emerging therefrom in the form of beef or pork. The Commission was correct, in our opinion, in holding fresh and frozen meat to be non-exempt.

The enforcement of the order of the Interstate Commerce Commission, MC-C-1605, *East Texas Motor Freight Lines, Inc., et al.* v. *Frozen Food Express*, is enjoined and re-

strained in so far as said order interfered with, enjoins or restrains the plaintiff Frozen Food Express from transporting fresh and frozen dressed poultry in interstate commerce (when the motor vehicles used in carrying such poultry are not used for carrying any other property or passengers for compensation). Other relief sought by plaintiff is denied.

Clerk will notify counsel.

Done at Houston, Texas, this 26th day of January, 1955.

(S.) Joseph C. Hutcheson, Jr., Chief Judge, Fifth Circuit; Ben C. Connally, United States District Judge; T. M. Kennerly, United States District Judge, concurring in part and dissenting in part.

[fol. 234] KENNERLY, District Judge, concurring in part and dissenting in part:

I concur with all the foregoing opinion except the decision in Civil Action 8396 with respect to fresh meat and frozen meat. As to that I respectfully dissent.

I think all of Section 303(b) should be given a broad and liberal construction, and that Section 303(b)(6) should be construed as including fresh meat and frozen meat. I think we should not only follow the reasoning of both the District Court and Court of Appeals in the *Kroblin* case with respect to dressed poultry and frozen dressed poultry, but that what is said is also applicable to fresh meats and frozen meats.

(S.) T. M. Kennerly, Judge.

[fol. 235] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 8285

FROZEN FOOD EXPRESS, ET AL., Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., Defendants

FINAL JUDGMENT—February 23, 1955

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on November 16, 1954, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises; and having on January 26, 1955, filed herein its opinion, holding that the order sought by the plaintiffs to be set aside and enjoined is not an order subject to judicial review under any of the said statutes; now, in accordance with the said opinion, it is hereby

Ordered, adjudged, and decreed that the relief prayed for by the plaintiffs, including the Secretary of Agriculture as an intervening plaintiff, be, and the same hereby is, denied, and their complaints be, and the same hereby are, dismissed.

This the — day of February, 1955.

J. C. Hutcheson, Chief Judge, United States Court of Appeals for the Fifth Circuit, —— ——, United States District Judge, —— —— United States District Judge.

[fol. 236] APPROVAL OF FORM OF JUDGMENT

The undersigned, as attorneys of record for the respective parties to this action, hereby indicate their approval of the form of the annexed and foregoing judgment.

Carl L. Phinney, Attorneys for Frozen Food Express, Plaintiff, Walter D. Matson, Attorney for Ezra Taft Benson, Secretary of Agriculture, Intervening Plaintiff, James E. Kilday, Attorney for the United States of America, Defendant, Leo H. Pou, Attorney for the Interstate Commerce Commission, Defendant.

[fol. 237] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

NOTICE OF APPEAL BY CLASS I RAILROADS—Filed April 19, 1955

I

Notice is hereby given that the Class I railroads, a list of which is attached hereto, and made a part hereof, as Appendix A, intervening defendants in support of defendant Interstate Commerce Commission in the above-styled civil action, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on February 23, 1955.

This Appeal is taken pursuant to 28 U.S.C.A. 1253 and 2101(b).

[fol. 238] II

It is agreed by the intervening defendant railroads appealing herein that the record on appeal shall consist of the transcript of the record as requested by the defendant Interstate Commerce Commission in its Notice of Appeal in this action, in which transcript the clerk will please include this Notice of Appeal.

III

The following question is presented by this appeal:

Whether the district court was in error in holding that the report of the Interstate Commerce Commission in No. MC-C-968, *Determination of Exempted Agricultural Commodities*, in which the Commission determined which of certain commodities could be transported within the exemption of Section 203(b)(6) of the Interstate Commerce Act (49 U.S.C.A. 303(b)(6)) and which could be transported only pursuant to operating authority, was not subject to judicial review, either as an "order" within the meaning of the Interstate Commerce Act or as interpretative rule making under the Administrative Procedure Act?

(S.) Margaret P. Allen, 1740 Suburban Station Building, Philadelphia 4, Pennsylvania, (S.) Edwin N. Lell, Esperson Building, Houston, Texas, (S.) Joseph H. Hays, 280 Union Station Building, Chicago 6, Illinois, (S.) Carl Helmetag, Jr., 1740 Suburban Station Building, Philadelphia 4, Penn-
[fols. 239-240] sylvania, (S.) James W. Nisbet, 280 Union Station Building, Chicago 6, Illinois, (S.) Charles P. Reynolds, Shoreham Building, Washington 5, D. C., Attorneys for Class I Railroads, Intervening Defendants.

Certificate of Service (omitted in printing)

[Vol. 241] Appendix "A"

List of Class I Railroads

The below listed Railroads are the individual carriers which, together, are designated in the Notice of Appeal as "Class I Railroads," the intervening defendants appealing herein. When used, the term "Class I Railroads" includes each of these named Railroads:

Akron, Canton and Youngstown Railroad Company.
The Ann Arbor Railroad Company.

The Atchison, Topeka & Santa Fe Railway Company.
Atlantic Coast Line Railroad Company.
The Baltimore & Ohio Railroad Company.
Bangor and Aroostook Railroad Company.
Boston and Maine Railroad.
Central of Georgia Railway Company.
The Central Railroad Company of New Jersey.
Chicago & Illinois Midland Railway Company.
Chicago and Northwestern Railway Company.
Chicago, Burlington & Quincy Railroad Company.
Chicago Great Western Railway Company.
Chicago, Indianapolis and Louisville Railway Company.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company.
Chicago, Rock Island and Pacific Railroad Company.
The Delaware and Hudson Railroad.
The Delaware, Lackawanna and Western Railroad Company.
The Denver and Rio Grande Western Railroad Company.
The Detroit and Toledo Shore Line Railroad Company.
Detroit, Toledo and Ironton Railroad Company.
Duluth, South Shore and Atlantic Railway Company (P. L. Solether, Trustee).
Elgin, Joliet and Eastern Railway Company.
Erie Railroad.
Florida East Coast Railway Company (John W. Martin, Trustee).
Fort Dodge, Des Moines & Southern Railway Company.
Grand Trunk Railway System.
Great Northern Railway Company.
Green Bay & Western Railroad Company.
Gulf, Mobile and Ohio Railroad Company.
Illinois Central Railroad Company.
The Kansas City Southern Railway Company.
Lehigh and New England Railroad Company.
Lehigh Valley Railroad Company.
Main Central Railroad Company.
Midland Valley Railroad Company.
The Minneapolis & St. Louis Railway Company.
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company.

Missouri-Kansas-Texas Railroad Company.
Missouri Pacific Railroad Company (Guy A. Thompson, Trustee).
The Nashville, Chattanooga & St. Louis Railway.
New York Central System.
The New York, Chicago & St. Louis Railroad Company.
The New York, New Haven & Hartford Railroad Company.
New York, Ontario and Western Railway.
New York, Susquehanna and Western Railroad Company.
Norfolk and Western Railway.
Northern Pacific Railway Company.
[fol. 242] The Pennsylvania Railroad Company.
The Pittsburgh and West Virginia Railway Company.
Reading Company.
St. Louis-San Francisco Railway Company.
St. Louis Southern Railway Company.
Seaboard Airline Railroad Company.
Southern Railway Company.
Southern Pacific Company.
The Texas and Pacific Railway Company.
Toledo, Peoria & Western Railroad.
Union Pacific Railroad Company.
The Virginian Railway Company.
Wabash Railroad Company.
Western Maryland Railway.
The Western Pacific Railroad Company.

[fol. 243] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

NOTICE OF APPEAL BY INTERSTATE COMMERCE COMMISSION—Filed April 20, 1955

I

Notice is hereby given that the Interstate Commerce Commission, a defendant in the above-styled civil action,

hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on February 23, 1955.

This appeal is taken pursuant to 28 U. S. C. 1253 and 2101 (b).

II

The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) Complaint filed June 14, 1954, by Frozen Food Express, plaintiff, including the certificates of public convenience and necessity attached thereto as exhibits;

[fol. 244] (b) Order of June 21, 1954, convening a three-judge court for trial of the case;

(c) Amended complaint filed July 12, 1954, including exhibits;

(d) Answer of Interstate Commerce Commission, defendant;

(e) Motion for leave to intervene filed by Ezra Taft Benson, Secretary of Agriculture;

(f) Order allowing intervention by Secretary of Agriculture;

(g) Complaint filed by the Secretary of Agriculture, as intervening plaintiff, including Appendices A, B, and C thereto;

(h) Answer of Interstate Commerce Commission to the complaint of the Secretary of Agriculture;

(i) Answer of United States of America, defendant;

(j) Motion for leave to intervene filed by American Trucking Associations, Inc.;

(k) Answer of American Trucking Associations, Inc., with leave of court thereon;

(l) Motion for leave to intervene as defendants, filed by Atchison, Topeka & Santa Fe Railway Company, et al.;

(m) Stipulation as to intervention by Atchison, Topeka & Santa Fe Railway Company, et al.;

(n) Order allowing intervention of Atchison, Topeka & Santa Fe Railway Company, et al.;

(o) Answer of Atchison, Topeka & Santa Fe Railway Company, et al.;

(p) Motion for leave to intervene as defendants, filed by Atlantic Coast Line Railroad, et al.;

(q) Order allowing intervention of Atlantic Coast Line Railroad, et al.;

(r) Answer of Atlantic Coast Line Railroad, et al.;

(s) Motion of Eastern Railroads for leave to intervene;

[fol. 245] (t) Order allowing Eastern Railroads to intervene;

(u) Answer of Eastern Railroads;

(v) Motion for leave to intervene, and answer, filed by Common Carrier Irregular Route Conference of American Trucking Associations, Inc.;

(w) Order or notice setting the case for trial on November 16, 1954;

(x) Order of submission on November 16, 1954;

(y) Opinion of the Court, filed January 26, 1955;

(z) Final judgment, entered February 23, 1955;

(aa) This notice of appeal.

III

The following question is presented by this appeal:

Whether the district court was in error in holding the report and order of the Interstate Commerce Commission, made and entered April 13, 1951, in No. MC-C-968, *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, was not an order subject to judicial review; the Commission having determined in the said proceeding that certain specified commodities are unmanufactured agricultural commodities and therefore within the exemption provided by section 203(b)(6) of the Interstate Commerce Act (49 U. S. C. 303(b)(6)); and also having determined therein that certain other commodities are manufactured products of agricultural commodities and therefore not within the said exemption, and that motor common and contract carriers are required to have operating authority issued by the Commission in order to transport [fol. 246] such products in interstate commerce for compensation?

(S.) Edward M. Reidy, General Counsel. (S.) Leo H. Pou, Assistant General Counsel, Attorneys for the Interstate Commerce Commission, Washington 25, D. C.

[fols. 247-248] CERTIFICATE OF SERVICE

(Omitted in printing)

[fol. 249] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS—HOUSTON DIVISION

[Title Omitted]

NOTICE OF APPEAL BY FROZEN FOOD EXPRESS—Filed April 20, 1955

I

Notice is hereby given that Frozen Food Express, a corporation, complainant in the above-styled civil action, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on February 23, 1955.

This appeal is taken pursuant to 28 U.S.C. 1253 and 2101(b).

II

The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) Complaint filed June 14, 1954, by Frozen Food Express, complainant, including the certificates of public convenience and necessity attached thereto as exhibits;

(b) Order of June 21, 1954, convening a Three Judge Court for trial of the case;

(c) Amended complaint filed July 12, 1954, including exhibits;

(d) Answer of Interstate Commerce Commission, defendant;

[fol. 250] (e) Motion for leave to intervene filed by Ezra Taft Benson, Secretary of Agriculture;

(f) Order allowing intervention by Secretary of Agriculture;

(g) Complaint filed by the Secretary of Agriculture, as intervening plaintiff, including Appendices A, B, and C thereto;

(h) Answer of Interstate Commerce Commission to the complaint of the Secretary of Agriculture;

(i) Answer of United States of America, defendant;

(j) Motion for leave to intervene filed by American Trucking Associations, Inc.;

(k) Answer of American Trucking Associations, Inc., with leave of court thereon;

(l) Motion for leave to intervene as defendants, filed by Atchison, Topeka & Santa Fe Railway Company et al;

(m) Stipulation as to intervention by Atchison, Topeka & Santa Fe Railway Company et al;

(n) Order allowing intervention of Atchison, Topeka & Santa Fe Railway Company et al;

(o) Answer of Atchison, Topeka & Santa Fe Railway Company et al;

(p) Motion for leave to intervene as defendants, filed by Atlantic Coast Line Railroad et al;

(q) Order allowing intervention of Atlantic Coast Line Railroad et al;

(r) Answer of Atlantic Coast Line Railroad et al;

(s) Motion of Eastern Railroads for leave to intervene;

(t) Order allowing Eastern Railroads to intervene;

(u) Answer of Eastern Railroads;

(v) Motion for leave to intervene, and answer, filed by Common Carrier Irregular Route Conference of American Trucking Associations, Inc.;

[fol. 251] (w) Order or notice setting the case for trial on November 16, 1954;

(x) Order of submission on November 16, 1954;

(y) Opinion of the Court, filed January 26, 1955;

(z) Final judgment, entered February 23, 1955;

(aa) This notice of appeal.

III

The following question is presented by this appeal:

Whether the district court was in error in holding the Report and Order of the Interstate Commerce Commission, made and entered April 13, 1951, in No. MC-C-968,

Determination of Exempted Agricultural Commodities, 52 M.C.C. 511, was not an Order subject to judicial review; the Commission having determined in the said proceedings that certain specified commodities are unmanufactured agricultural commodities and therefore within the exemption provided by Section 203(b)(6) of the Interstate Commerce Act (49 U.S.C. 303(b)(6)); and also having determined therein that certain other commodities are manufactured products of agricultural commodities and therefore not within the said exemption, and that motor common and contract carriers are required to have operating authority issued by the Commission in order to transport such products in interstate commerce for compensation?

(S.) Carl L. Phinney, Phinney and Hallman, 617 First National Bank Bldg., Dallas, Texas; Attorneys for Complainant, Frozen Food Express

[fols. 252-253] CERTIFICATE OF SERVICE

[Omitted in printing]

[fol. 254] SUPPLEMENTAL CERTIFICATE OF SERVICE BY CLASS I RAILROADS

[Omitted in printing]

[fol. 255] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT BY AMERICAN TRUCKING ASSOCIATIONS, INC., COMMON CARRIER CONFERENCE IRREGULAR ROUTE AND CONTRACT CARRIER CONFERENCE THEREOF—Filed, April 22, 1955

I

Notice is hereby given that American Trucking Association, Inc., the Common Carrier Conference Irregular Route and the Contract Carrier Conference thereof, intervening

defendants in the above-captioned proceeding, hereby appeal to the Supreme Court of the United States from the final judgment rendered in this action on February 23, 1955.

This appeal is taken pursuant to Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C.A. §§ 1253 and 2101(b).

II

The designation of the portions of the record to be certified by the clerk contained in the Notice of Appeal filed by the Interstate Commerce Commission is adopted and hereby incorporated by reference.

III

The following question is presented by this appeal:

Did the United States District Court for the Southern District of Texas err in its judgment rendered February 23, 1955; dismissing the complaints filed in Civil Action Nos. 8285, *Frozen Food Express, et al. v. United States, et al.*, for the reason set forth in the Court's opinion filed January 26, 1955, that the order of the Interstate Commerce Commission, dated April 13, 1951, in Docket Number MC-C-968, *Determination of Exempted Agricultural Commodities*, sought by the plaintiffs to be set aside and enjoined, is not an order subject to judicial review under Section 205(g) of the Interstate Commerce Act, 49 U.S.C.A. § 305(g), Section 10 of the Administrative Procedure Act, 5 U.S.C.A. § 1009, and Sections 1336, 1398, 2284 and 2321 to 2325, inclusive, of the Judicial Code, 28 U.S.C.A. §§ 1336, 1398, 2284 and 2321-2325, although the Commission in said pro- [fol. 256] ceeding classified certain processed agricultural commodities as being embraced within the exemption of Section 203(b)(6) of the Interstate Commerce Act, 49 U.S.C.A. § 303(b)(6) and, hence transportable by motor vehicles not subject to economic regulation by the Commission and classified other such processed agricultural commodities as being beyond the scope of the exemption of Section 203(b)(6) and thus able to be carried only in Commission-regulated motor vehicles?

Respectfully submitted, Rollo E. Kidwell, Callaway, Reed, Kidwell & Brooks, 301 Empire Bank Building, Dallas 1, Texas, Attorney for appellants, (S.)

Peter T. Beardsley, Fritz R. Kahn, 1424 Sixteenth Street, N. W., Washington 6, D. C., Attorneys for American Trucking Associations, Inc., (S.) Clarence D. Todd, Dale C. Dillon, Todd, Dillon and Curtiss, 944 Washington Building, Washington 5, D. C., Attorneys for Common Carrier Conference Irregular Route and Contract Carrier Conference of American Trucking Associations, Inc.

[fol. 257] Certificate of Service (omitted in printing)

[fol. 258] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 259] Supreme Court of the United States

Order Noting Probable Jurisdiction—October 10, 1955

Appeals from the United States District Court for the Southern District of Texas.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted.

October 10, 1955.

(5229-0)